

RECORD OF TRIAL COVER SHEET

**IN THE
MILITARY COMMISSION
CASE OF**

UNITED STATES

V.

**ALI HAMZA AHMAD
SULAYMAN AL BAHLUL**

ALSO KNOWN AS:

**ALI HAMZA AHMED SULEIMAN AL BAHLUL
ABU ANAS AL MAKKI
ABU ANAS YEMENI
MOHAMMAD ANAS ABDULLAH KHALIDI**

No. 040003

VOLUME VIII OF ____ TOTAL VOLUMES

**2ND VOLUME OF TRANSCRIPT (R. 139-407)
MAR. 1-2, 2006 SESSION
(REDACTED VERSION)**

United States v. Ali Hamza Sulayman al Bahlul, No. 040003

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A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at <http://www.defenselink.mil/news/commissions.html>.

Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

Transcript and Review Exhibits are part of the record of trial, and are considered during appellate review. Volumes I-VI, however, are allied papers and as such are not part of the record of trial. Allied papers provide references, and show the administrative and historical processing of a case. Allied papers are not usually considered during appellate review. *See generally United States v. Gonzalez*, 60 M.J. 572, 574-575 (Army Ct. Crim. App. 2004) and cases cited therein discussing when allied papers may be considered during the military justice appellate process, which is governed by 10 U.S.C. § 866). For more information about allied papers in the military justice process, see Clerk of Military Commission administrative materials in Volume III.

VOLUME
NUMBER

SUBSTANCE OF CONTENTS

ALLIED PAPERS Not part of “record of trial”

- | | |
|------|---|
| I* | Military Commission Primary References (Congressional Authorizations for Use of Force; Detainee Treatment Act; UCMJ articles; President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda—includes DoD rescinded publications) |
| II* | Supreme Court Decisions: <i>Rasul v. Bush</i> , 542 U.S. 466 (2004); <i>Johnson v. Eisentrager</i> , 339 U.S. 763 (1950); <i>In re Yamashita</i> , 327 U.S. 1 (1946); <i>Ex Parte Quirin</i> , 317 U.S. 1 (1942); <i>Ex Parte Milligan</i> , 71 U.S. 2 (1866) |
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VOLUME II OF TRANSCRIPT

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Index of Transcript

THIRD SESSION:

March 1-2, 2006

The same persons were present at the hearing who were there previously, except there was a change of court reporters [139](#)

The Accused explained that his boycott was based on the nine points as he stated at the last session (R. 143). The Accused has received a copy of the last proceedings (R. 143). He considers the appointed counsel to be a friend of the court (R. 144). The Accused said he was concerned about the possibility of closed hearings (R. 147-48). He said he was a member of al Qaida (R. 148). [142-149](#)

The Presiding Officer stopped the Accused and warned him about incriminating himself, and asked him not to discuss his background or to comment about what he had done. [149-150](#)

The Accused stated that he “had no direct relationship with the events of September 11th.” [151-152](#)

The Accused said he was continuing his boycott, that he was not going to forfeit his right to defend himself. He noted he was not permitted to represent himself, and his American counsel was being imposed against his will. He asked the Presiding Officer to explain how Detailed Defense Counsel would not have a conflict of interest because of the Accused’s relationship with al Qaida. The Accused characterized Major Fleener as a “friend of the court.” [153-154](#)

The Presiding Officer explained that Detailed Defense Counsel was not a “friend of the court”, but was required to represent the interests of the Accused. The Presiding Officer explained that the Accused could request other military counsel, and that he could request civilian counsel. [155-159](#)

The Accused said that his detailed counsel would have to be non-

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American to be able to put aside his psychological anger about September 11th. He wanted counsel to whom he could give his total trust, and he suggested a Yemeni counsel.	<u>160-163</u>
The Presiding Officer re-advised the Accused of his counsel rights. He urged the Accused to ask MAJ Fleener to help the Accused obtain a Yemeni counsel who is a U.S. citizen, if that is what he desires.	<u>163-164</u>
The Accused said that he would reject the Yemeni who has an American citizenship or a dual citizenship, the same as for an American counsel.	<u>165-166</u>
The Presiding Officer re-advised the Accused of his counsel rights, and he told the Accused he is represented by MAJ Fleener, and that MAJ Fleener can help him find other counsel, or a non-citizen, attorney advisor, if he wants one.	<u>166-167</u>
The Accused asked if a Yemeni, Attorney-Advisor could attend closed hearings.	<u>168-169</u>
The Presiding Officer said that the rules would not permit such an attorney-advisor to attend a closed hearing, but he would not speculate further about what the attorney-advisor could do.	<u>169</u>
The Accused said he was interacting or participating for the moment and he was demonstrating how he could represent himself. The Accused asked for reconsideration of the decision that he could not represent himself. The Accused said he wrote Kalid Sheikh Muhammad, and Ramzi bin Al Shibh, those directly responsible for the carrying out of September 11th, to inform the higher echelons about his self-representation.	<u>170-172</u>
The Presiding Officer denied the Accused's request to go pro se, said that Major Fleener was appointed counsel, and told the Accused to ask for Major Fleener's help if he wanted an Attorney-Advisor.	<u>173</u>
The Accused said he was boycotting the proceedings.	<u>174</u>

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Major Fleener moved to withdraw as counsel for the Accused.	<u>175-177</u>
The Presiding Officer denied Major Fleener's request to withdraw as counsel for the Accused.	<u>176, 178</u>
Major Fleener began to voir dire the Presiding Officer in advance of making a challenge for cause.	<u>178-179</u>
The Presiding Officer does not receive evaluation reports, and does not have a supervisor (R. 182). The Presiding Officer is an Associate and not an active member of the Virginia Bar (R. 185). As such, he is not required to do continuing legal education (CLE) (R. 185). Major Fleener presented an April 20, 1989, Opinion by the Virginia Bar (<u>RE 165</u>) indicating that an Associate may not practice law in Virginia (R. 186-187). The Presiding Officer did not have ethics training in 2006, was unsure about whether he had such training in 2005 or 2004 (R. 188). The only CLE the Presiding Officer had since 2004 was the Law of War Course (R. 189).	<u>179-189</u>
From 1980 to 1984, the Presiding Officer practiced law in Falls Church, Virginia in the Army Trial Defense Service (R. 190-191). During those same years, he was an Associate Member of the Virginia Bar (R. 191).	<u>190-191</u>
The Presiding Officer described his contacts with the Appointing Authority, and elaborated on information from REs 138 and 153, which are documents the Presiding Officer provided to assist with voir dire and potential challenge of himself. The Presiding Officer said he was independent of the Appointing Authority and felt free to disagree with him (R. 197-202). He said he had an open mind and urged Major Fleener to brief legal issues (R. 199).	<u>191-202</u>
The Presiding Officer initially declined to answer questions about siblings or parents because of lack of relevance (R. 203). He declined to answer questions about his communications with Mr. Hodges because of privilege (R. 204). The Presiding Officer offered to reconsider provided defense counsel brief the issue (R. 204-206). The decision denying the defense motion to preserve	

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evidence is RE 154 (R. 205).	<u>203-205</u>
The Presiding Officer discussed his employment after retirement, but before becoming a Presiding Officer.	<u>206-211</u>
The Presiding Officer discussed <i>U.S. v. Kreutzer</i> , a court-martial tried in 1996 in which Colonel Brownback was the military judge (R. 211). The Presiding Officer said he learned from the case (R. 214).	<u>211-216</u>
The Presiding Officer described his efforts to remain current in the law through self-study and reading (R. 216). The Presiding Officer answered questions about his military assignments in Special Operations, and as a trial judge (R. 217-223)	<u>216-223</u>
The Presiding Officer stated that poking someone in the eye with a needle would constitute torture (R. 223-224). The Presiding Officer said that it was not likely he would let in evidence that came from such torture, but it would have to be briefed (R. 225).	<u>223-226</u>
The Presiding Officer was not sure about whether his recall to active duty from retirement would result in an increase in his retired pay.	<u>226-228</u>
The Presiding Officer provided additional information about his father and siblings.	<u>228-232</u>
The Presiding Officer had some discussions at the Army JAG School with an instructor concerning the Law of War.	<u>232-233, 238-239</u>
The Presiding Officer had previously been the military judge on a court-martial case involving abuse of a trainee, which occurred during a training-interrogation scenario.	<u>236-238</u>
The Presiding Officer is detailed to the Office of the Appointing Authority, but is not assigned to that office.	<u>240</u>

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The Presiding Officer described his contacts with the Office of the Appointing Authority, concluding the defense voir dire.	<u>241-251</u>
After a recess, the Accused did not return to the proceeding. Major Fleener said that the Accused was voluntarily absent from the proceeding because he was not allowed to freely choose his own lawyer or to represent himself. Major Fleener said it was a voluntary boycott. The Presiding Officer said he did not intend to force the Accused to attend the proceeding.	<u>256-264</u>
The Prosecution had no challenge of the Presiding Officer.	<u>264</u>
Major Fleener asked about the Presiding Officer's father's opinions and background.	<u>265-268</u>
The Presiding Officer described the contents of notes handed to him during the proceeding.	<u>268-270</u>
The Presiding Officer granted Major Fleener's request to brief in detail the issue of challenge of the Presiding Officer, after reviewing the transcripts.	<u>270-272</u>
Major Fleener challenged the Presiding Officer for cause because he is not independent, neutral, and detached (R. 273, 279). The Appointing Authority and the Presiding Officer are friends (R. 274). The Presiding Officer is not qualified because he is not an active member of the Virginia Bar, recognizing that his inactive status is not a disqualification to be a Judge Advocate (R. 275-277). The Presiding Officer is not qualified because of a lack of Continuing Legal Education (R. 276), and ethics training (R. 278). The Presiding Officer is biased—he always agrees with the Appointing Authority (R. 279-283).	<u>273-283</u>
The Prosecution objected to the defense challenge of the Presiding Officer. The Presiding Officer is qualified under Commission Law. The Presiding Officer is qualified as a judge. The Virginia Bar Rules are irrelevant. CLE credit is irrelevant. The communications in the email between the Presiding Officer and Office of Appointing	

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Authority do not indicate the Presiding Officer's opinion on a legal matter.	<u>283-288</u>
Major Fleener responded that the Office of the Appointing Authority and the Presiding Officer were shaping the system. These same persons wrote the rules and would decide how the cases were resolved. The Appointing Authority picked his friend to be the Presiding Officer. The Appointing Authority decided that the Accused could not represent himself and what should be the standard for challenge for cause, and the Presiding Officer did not overrule these decisions.	<u>288-295; 298-301</u>
The Prosecution responded that the Defense did not object to the standard used for challenges for cause.	<u>295-298</u>
The Presiding Officer announced findings of fact and conclusions of law before denying the Defense challenge. The Presiding Officer explained the process for his conclusion that the Accused could not represent himself, and described his lack of input into Military Commission Orders and Instructions. The Presiding Officer's bar membership is inactive. <i>See U.S. v. Steele</i> , 53 M.J. 274 (R. 304). He did not have formal ethics training. The Presiding Officer is very experienced in Commission law. The Presiding Officer applied the "modified implied bias standard" from Rule for Courts-Martial 902 for for challenges for cause as well as the Appointing Authority's standard. Under either standard, the Presiding Officer concluded that granting the challenge was not warranted.	<u>301-307</u>
The Presiding Officer gave Major Fleener until March 22 to submit his brief on the challenge of the Presiding Officer, and the Prosecution would have until March 29 to submit an answer.	<u>307-308</u>
Major Fleener briefly addressed the motion for continuance because he thought the Accused might have tuberculosis. Major Fleener objected to the Prosecution's characterizations of the request.	<u>308-312</u>
The parties discussed the process for bringing the Accused	

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to the Commission building for the next day's hearings.	<u>313-322</u>
The hearing recessed at 2000, March 1, 2006.	<u>322</u>
The hearing resumed at 0900, March 2, 2006.	<u>323</u>
The Accused was present in the Commission building, but voluntarily chose to be absent from the hearing.	<u>325</u>
The Defense Counsel made a motion to quash or abate the proceeding because the President's Military Order (PMO) requires the presence of all Commission members at the hearing. Major Fleener argued that Military Commission Order No. 1 (MCO 1), as revised, was in conflict with the PMO. He also argued that the old MCO 1, which was in effect when the first al Bahlul hearing was held, should be used instead of the new MCO 1 (R. 332). Major Fleener remarked, "I don't believe I'll be filing any more motions in this case because of what Mr. al Bahlul would like me to do." (R. 332).	<u>325-335</u> <u>375-378</u>
The Prosecution opposed the defense motion, and initially relied on their brief. Later, the Prosecution pointed out the Detainee Treatment Act of 2005 cited MCO 1 (Aug. 31, 2005), which showed the President was aware of MCO 1 and desired that MCO 1's features be applied.	<u>335; 379-380</u>
The Presiding Officer described the process that he used to ask the Appointing Authority questions in 2004, including whether all Commission members were required to be present for motions.	<u>337-339</u>
The Presiding Officer questioned Major Fleener about meeting deadlines and getting motions filed.	<u>341-383</u>
Major Fleener explained that he did not file motions because he was trying to avoid a directive from the Accused that he too should boycott the proceeding (R. 344). Major Fleener cited <i>United States v. Torres</i> , [140 F.3d 392 (2d Cir. 1998)], in which a defendant was allowed to go pro se, and then Torres boycotted the proceeding	

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(R. 345). Major Fleener gave three possibilities of what his role should be: (1) boycott also, if that is what the Accused wants; (2) act as his guardian, meaning make all decisions in the case, and vigorously contest the case of the Accused's behalf; or (3) some role between 1 and 2 (R. 347-348). Major Fleener is doing everything he can to vindicate the Accused's right to self-representation (R. 375).	<u>341-351; 363-365 367-369</u>
After a recess, Major Fleener indicated the Accused still wished not to attend the proceedings.	<u>373</u>
The Presiding Officer denied the Defense motion to quash, D103, because of the alleged conflict between the PMO and MCO 1 as to the requirement for the other Commission Members to be present. He said that he would add essential findings of fact and conclusions of law to the record prior to authentication.	<u>380-381</u>
The Presiding Officer noted that he had not received a motion from Major Fleener requesting the right of self-representation, all he had was comments on the record about this right. The Presiding Officer previously received such briefs in 2004. Should the desires of the accused change, the motion is due on March 24, 2006 (R. 384).	<u>373-386</u>
Major Fleener requested a 90-day extension to permit more time to file motions (R. 386-390). Major Fleener said he would brief the self-representation issue by March 24 (R. 388). COL Sullivan has no lawyers to assist Major Fleener, and even if he did, perhaps he would not be added to the case because of the Accused's desires (R. 389).	<u>386-392</u>
The Prosecution opposed the delay as unwarranted.	<u>392-394</u>
Major Fleener stated his request to the Wyoming Bar was his attorney-work product (R. 397). The Presiding Officer indicated that any response from the Wyoming Bar would be considered not to be based on a complete record, if the request was similar to the one Major Fleener submitted to the Iowa Bar (R. 398). Major Fleener stated the Wyoming Bar orally declined to provide an	

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opinion (R. 398). The Presiding Officer ordered Major Fleener to provide any opinion received from the Wyoming Bar to the Commission (R. 399).	<u>397-399</u>
After a recess, Major Fleener stated that his client was voluntarily absent, but that he wanted to meet privately with the Presiding Officer (R. 404). The Presiding Officer declined to meet with the Accused privately (R. 405).	<u>404-405</u>
The Commission recessed at 1215, March 2, 2006.	<u>406</u>
Authentication for pages 139 to 407.	<u>407</u>

1 *The Commissions hearing was called to order at 1329, on 1 March*
2 *2006.*

3

4 Presiding Officer: The Commissions will come to order.
5 Please account for the parties.

6

7 PROS: Yes, sir. All parties who were present when the
8 Commission recessed are again present with the
9 following exceptions:

10

11 We have, as our court reporter today, [REDACTED]
12 [REDACTED] who is already sworn. We
13 have a new defense interpreter. I don't know his
14 name, but he was sworn in yesterday. We also have
15 a new Commission interpreter, who was previously
16 sworn. Her C.V. is at Review Exhibit 159.

17

18 Presiding Officer: Thank you. I have been informed that the
19 Assistant arranged for each side to receive a CD,
20 with all of the Review Exhibits; electronically
21 sent an additional RE, which is 158; and a new
22 listing of the REs.

1 Have all of you received those items?

2
3 PROS: Yes, sir.

4
5 DC: Yes, sir.

6
7 Presiding Officer: Major Fleener, based on your request, and
8 over the prosecutions's objection, we did not have
9 an 8-5 conference yesterday. Consequently, both
10 sides, I may asking questions that we -- may not
11 have needed to be asked if we had met before we
12 came to court.

13
14 Have you had an opportunity, Major Fleener, to talk
15 to your client since we last met?

16
17 DC: I have, Your Honor. And, if I may, Mr. al Bahlul
18 would like to address the court before we begin.

19
20 Presiding Officer: The court notes that -- the Commission
21 notes that Mr. al Bahlul is present in the
22 courtroom, but he does not have his headphones on.

1 If -- sir, referring to -- speaking to Mr. al
2 Bahlul's translator -- could you please ask him to
3 put his headphones on if he wants to participate?
4

5 *The Accused and the translator conferred.*
6

7 TRANS: Your Honor, Mr. Al Bahlul says that he will put --
8

9 DC: Will he be allowed to address the -- address the
10 court or address you, sir?
11

12 Presiding Officer: I wouldn't have him put his headphones on
13 if not for that, Major Fleener.
14

15 DC: Yes, sir.
16

17 Presiding Officer: Yes.
18

19 Let the record reflect that Mr. Al Bahlul is
20 putting his headphones on.
21

22 Can you hear me, Mr. Al Bahlul?

1 ACC: Yes, sir, well -- I hear you well.

2

3 Presiding Officer: Can you hear now?

4

5 ACC: I hear you, and I hear them fine.

6

7 Presiding Officer: Okay. Mr. Al Bahlul, your attorney told
8 me that you wanted to address the court. You may
9 address the court. Please, however, when you
10 address the court, speak slowly so that the
11 translation can come to me.

12

13 ACC: Yeah, I will speak slowly. Your Honor, you -- you
14 know well that in the past -- during the past
15 hearing, I announced my intention to boycott the
16 proceeding, because I think there is a
17 misconception or misunderstanding with respect to
18 the meaning of "boycott." I would like clarify the
19 meaning of boycotting. It doesn't mean that I'm
20 going to be totally silent. This is not common
21 sense, of course. Let's say that the proceedings
22 start and the hearings start, and I felt that some

1 points would cause me some grievances; so pursuant
2 to the tenets of my religion, I would have to stick
3 up and defend myself. That is the first point.
4

5 I would like to add that the boycott from my
6 perspective was based on nine points, which all
7 have a legal nature -- of a legal nature, and that
8 they have been detailed in the past time. And I
9 thank the judge, that he provided me with the
10 original copy entailing those points. And he
11 included another copy in the record. These copy --
12 this copy entails also administrative procedures.
13

14 Going back to the definition of "boycott," in the
15 sense that I have a counsel who will represent me,
16 and the Presiding Officer informed me that I cannot
17 go ahead with pro se. And this time, he gave me
18 the permission to address the court. And he
19 indicated that my counsel, in fact -- he acted upon
20 the request of my counsel. As of yet, I consider
21 that I do not have a counsel -- a counsel who

1 represents me. And in my desire to abide by the
2 request of the judge and the hearings of
3 August 2004, I consider the counsel a friend of the
4 court. And today I spoke to him in view of the
5 fact that he is a friend of the court. And I did
6 not consider him the appointed counsel to me, but
7 the administrative procedure for Military -- the
8 Military Commission calls for the appointment of a
9 military counsel to the detainees.

10
11 So going back to the definition of "boycott" -- I
12 mean -- I mean that when the hearings start, in
13 citing the evidence and cross-examination, et
14 cetera, and in assessing the real value of the
15 evidence presented, and in assessing credibility of
16 the witnesses, and all the procedures and the
17 proceeding in these hearings -- I have to say that,
18 however, it's true that we did not reach this phase
19 yet.

20
21 Presiding Officer: Please repeat that last translation. "We
22 did not reach the --

1 ACC: We did not -- I have to say, though, that we did
2 not reach this phase yet.

3
4 Presiding Officer: Okay. Go on.

5
6 ACC: Up to this -- up to this point, we did not reach
7 this phase of weighing the evidence and assessing
8 the credibility of witnesses, et cetera. It
9 doesn't make sense to me that Mr. Fleener, who is
10 the appointed counsel to me, without me having the
11 chance to sit and talk with him -- it's not because
12 of fault of his, but because I'm just contesting
13 the fact that I didn't have the free choice to
14 choose my counsel. I had the right to have a
15 counsel appointed to my case, and that this matter
16 should be con -- this matter should be consensual.
17 I think a counsel should not be imposed -- should
18 not be imposed upon me.

19
20 Do you know, Your Honor? Why I am going back to
21 the nine points of objection that I mentioned
22 earlier. And with reference to the fifth point,

1 which has a relationship with the Yemeni
2 government. If you have a good recollection, I'm
3 sure you -- you remember these points.

4
5 I just would like to say, in the absence of a
6 counsel to represent me in this proceeding where
7 evidence will be discussed and this -- with the
8 reference to the future hearings, the occasion
9 might arise where I will not be allowed to sit in
10 during these hearings.

11
12 Presiding Officer: Were the words that you used "I would not
13 be around"?

14
15 ACC: The occasion would not arise for me to sit in these
16 hearings.

17
18 I just meant to say part of the administrative
19 procedure followed by the Commissions, as published
20 pursuant to Presidential Order Bush, that some of
21 these hearings are secret, and detainees, or
22 defendants, are not allowed to sit during these

1 hearings, and only the appointed counsel is allowed
2 to attend these hearings -- these hearings.

3
4 In this case, and in the absence of a counsel
5 appointed to my case, I should entrust my counsel
6 with the case. And he's supposed to be impartial.
7 I mean, I refuse the very idea that an American and
8 a military counsel be appointed to my case -- or
9 civilian.

10
11 From this basis then, and from the fact that some
12 of the hearings might be classified or closed, how
13 will I be able to defend myself or via the -- via
14 my counsel or -- in the case some information was
15 used? And their confession -- and this information
16 basically would be entered in the record -- or it
17 was yielded under -- under torture. And with
18 respect to the Yemeni government and the attempts
19 of some investigators in Qandahar to implicate the
20 Yemeni government of charges of having ties to Al
21 Qaida and the bombings -- and the bombings of USS
22 COLE in the Arab Shatta -- or sea in Aden, all of

1 these points when they are discussed -- I'm just
2 citing an example of some of my objections. Should
3 all of these points be discussed in -- in closed
4 hearings and under the guise of secrecy and
5 national security and national interest -- and
6 national security and strategic security?

7
8 In this case, I consider that counsel to represent
9 the U.S. Government and not to represent me. If
10 some evidence has been disclosed to the -- to the
11 public or to the press, in this case the hearings
12 are open to the public and to the press. I think
13 that such hearings bring some grievances and do not
14 bring or achieve justice. With respect to
15 September 11th, in the hearing of August -- during
16 the hearing of August 2004, I sat, and the
17 Presiding Officer heard what I said. I am a member
18 of Al Qaida.

19
20 Presiding Officer: Mr. al Bahlul, I -- please, Mr. al
21 Bahlul. I'm in charge. I've let you talk. Common
22 courtesy, at the very least, means that you let me

1 talk. Please, just a second.

2
3 If you wish to present evidence, meaning something
4 that the Commission will consider, you may do it at
5 a proper time. If you wish to state something
6 about what's going on here, I'll let you do that.
7 Last time too, right?

8
9 ACC: [No response.]

10
11 Presiding Officer: I let you make your statement last time
12 and today. However, I am concerned that you not
13 say something that will be used against you. And I
14 do not know what the prosecution wants to do. I do
15 not know what the defense wants to do. But I feel
16 certain that they will try to use almost anything
17 against you, because that's the nature of lawyers.
18 So, please, do not go into your background. If you
19 want to talk about your relationship with Major
20 Fleener, if you want to say you want another
21 attorney, if you say you want to represent --
22 represent yourself, I have been very liberal about

1 doing that. But, please, Mr. al Bahlul, until we
2 get to a point where you come to the stand and
3 raise your right hand, please, do not talk about
4 what you have done, who you belong to, what your
5 beliefs are in so far as the prosecution might be
6 con -- might be interested. Please, do not,
7 because I'm going to stop you every time you do it.

8
9 Okay. Go on.

10
11 ACC: I believe that the Presiding Officer anticipated
12 something I am not seeking, in fact, to do. And
13 just because I mentioned what happened in August of
14 2004, and his Honor believed that the scenario will
15 repeat itself, I don't think it's accurate for this
16 time around.

17
18 I extend my thanks to his Honor for what -- for his
19 remarks, that he would not allow me to say
20 something that would incriminate me. And in the
21 past time, I -- I recognized the gesture and the
22 care of his Honor. And I indicated that was part

1 of his eagerness for fairness. And I just give a
2 statement with respect to boycotting.

3
4 I think, his Honor, as soon as I made reference to
5 the hearing of August 2004, he -- that what -- what
6 crossed his mind was the repetition of the scenario
7 that took place then. That's not my intent.

8
9 Presiding Officer: Perhaps, in Arabic, there is a saying
10 such as we have in English: "Once burned, twice
11 shy." It means that once I've been burned by
12 something, I will stay away from it if I can.

13
14 Continue on with your boycott.

15
16 ACC: Yes, that's -- that's also one of the sayings of
17 the Prophet -- or along those lines.

18
19 First of all, I would like to clarify something
20 with respect to my statements in the hearing of
21 August 2004 that I was a part or affiliated with al
22 Qaida but that I had no direct relationship with

1 the events of September 11th just for the purpose
2 and for the sake of clarification and for the sake
3 of clarification to every -- all -- all people in
4 the courtroom and those -- all who also were here
5 during the hearing of 2004 -- August 2004, I've not
6 taken the witness stand currently. I'm not giving
7 my testimony at this moment, and the hearings for
8 evidence and cross-examination have yet to take
9 place. I'm very aware of this fact.

10
11 I'm just making -- I'm just citing my objections
12 with -- with respect to closed hearings. And,
13 also, I -- I talked about the point with the
14 reference to the Yemeni government and the
15 questions of the investigation with respect to the
16 USS COLE attacks, et cetera. That was just one
17 point of -- just to clarify my objections.

18
19 Now, with reference to the second example, which is
20 the subject of the September 11 attacks, and the
21 judge was concerned that I make a statement similar
22 to what I had said earlier, I just attempted here

1 to clarify the question of boycott, and I'm not
2 going to address the nine points all together
3 because you have them listed in one copy and all
4 the hearings are recorded, of course. So it's --
5 you have both written and -- written copies in the
6 record. My attending today does not mean in any
7 way that I -- I abandoned my intention to boycott.
8 I'm still holding the ground and -- I'm standing my
9 ground. I'm still boycotting these hearings. It
10 does not mean at all that I'm going to forfeit my
11 right to defend myself; but still within the
12 parameters what already clarified --

13
14 Presiding Officer: Excuse me. Please, translate that
15 again -- please, say that again.

16
17 ACC: -- but still within the parameters of what I
18 clarified earlier, as of yet, you did not allow me
19 to represent myself and the counsel is still -- the
20 American counsel is still imposed on me.

21
22 Can I ask you a question, Your Honor, after your

1 permission?

2
3 Presiding Officer: Go on.

4
5 ACC: Thank you, sir.

6
7 My question is the following: How can you solve
8 the dilemma of a conflict between a person
9 affiliated from al Qaida and the appointment of an
10 American counsel imposed on that same person? How
11 can you can you reconcile? Can you give me a legal
12 explanation to the -- this matter and something
13 different from what's been -- what I heard during
14 the hearing of August 2004, which also took us to
15 the question of whether the counsel is a friend of
16 the court or not?

17
18 Presiding Officer: Mr. al Bahlul, I did have some notes from
19 when you spoke.

20
21 To character -- to characterize a defense counsel
22 who is representing a client as a "friend of the

1 court" is something that no experienced military
2 judge would ever do. I am not saying that the
3 relations, personally, between a judge and a
4 defense counsel will never be friendly, but the
5 defense counsel does not work for the judge. He is
6 not on the judge's side. He has one aim and one
7 aim only. That aim is to serve the interests of
8 his client.

9
10 In August 2004 -- someone give Mr. al Bahlul a
11 pen -- in August 2004, you stated that you did not
12 want -- I believe it was Commander [REDACTED] and Major
13 [REDACTED] and that you wanted to represent yourself.
14 At that time, they stated that they were not
15 representing you.

16
17 In order to get views supported -- supportive of
18 your desire to go pro se before myself, the
19 Appointing Authority, and whomever else might see
20 the matter, I instructed them to file motions as
21 amicus curiae. That's a Latin term meaning,
22 "friend of the court." I did that not so they

1 would be helping me, but so that they could present
2 your view on your behalf without violating their
3 duty to -- without violating what they saw as their
4 ethical concerns. That is why they were termed
5 amicus curiae or "friends of the court." That's
6 the first point.

7
8 The second point is that a defense counsel -- you
9 called him "impartial." A defense counsel is not
10 impartial. A defense counsel has one aim, and that
11 aim is to secure the best possible result for his
12 client.

13
14 ACC: Did you --

15
16 Presiding Officer: Quoting --

17
18 ACC: Did you finish, Your Honor?

19
20 Presiding Officer: You spoke for a long time, I get to
21 speak. Quoting from the MCI 4, "In this regard,
22 detailed defense counsel shall defend the Accused

1 to whom detailed zealously within the bounds of the
2 law and without regard to personal opinion as to
3 guilt." They -- a defense counsel is there to
4 represent you, not to be a friend of the court.

5
6 Third, you seem, I believe, to have a
7 misapprehension. And perhaps I didn't understand
8 it. You seem to think that we could hold closed
9 sessions where you would not be present but the
10 public and press would be. That is not correct.
11 If you are not present, the public and press will
12 not be. I'm not saying that there will be such
13 sessions. I am saying that if there are such
14 sessions, you only go out if they go out.

15
16 Now, you have used the term "imposed" concerning
17 Major Fleener several times -- or words like that.
18 And he was, in fact, detailed. And you did not
19 choose him. When we started I explained to you --
20 and I believe that you understand -- that you have
21 the right to choose another military lawyer. And
22 I'm sure that Major Fleener would be glad to help

1 you find another military lawyer. And you have a
2 right to have a civilian counsel. What you do not
3 have the right to do is to go without counsel. I
4 understand that that is not what you want, but
5 that's what it is.

6
7 Now, finally, as to how a defense counsel can
8 reconcile being in the United States Army and
9 defending someone who is allegedly associated with
10 al Qaida, I am not familiar with Major Fleener's
11 complete professional background. However, I am
12 aware that he has been a defense counsel in the
13 United States Army -- how long Major Fleener
14 approximately?

15
16 DC: Six years, sir.

17
18 Presiding Officer: Six years. And he has been a Federal
19 Public Defender. Based on my knowledge of U.S.
20 Army practice and the crimes that come before
21 Federal District Courts, I feel certain that he,
22 like all other defense counsel, has had to

1 represent people whose actions he finds abhorrent,
2 but that did not affect the quality or zealousness
3 of his representation.
4

5 Now, as to boycotting, you said you want to
6 boycott. I now -- to make sure I understand what
7 you mean by "boycott," you intend to be present at
8 all the sessions; is that correct?
9

10 ACC: [No response.]
11

12 Presiding Officer: Do you intend to be present at all the
13 sessions?
14

15 ACC: That's a good question, but I have a small remark.
16 May I say my remark? Because my remark actually is
17 linked to the answer itself.
18

19 Presiding Officer: Okay. Go on. Speak slowly.
20

21 ACC: With respect to what the judge said, would -- that
22 I said that he's not impartial -- that the counsel

1 is not impartial, maybe his Honor had the wrong
2 impression that I misunderstood the definition of
3 impartiality. What we mean, according to the legal
4 tenets and concepts, if two -- two sides are -- are
5 in conflict and that the conflict is still ongoing,
6 then it is common sense that the -- somebody
7 speaking for the other side is -- is something
8 that's acceptable. With respect to giving
9 testimony, for example, we do not accept the
10 testimony of an enemy when they testify about their
11 enemy because the suspicion of being unfair is just
12 looming and is possible and bias. Of course, you
13 come with a bias of hurting the enemy truly, and
14 aptly, and wrongly and rightly so.

15
16 Let's put the question of giving testimony aside
17 and come back to the issue of counsel. No doubt
18 that the events of September 11th had a great
19 reverberation as we all know. It's common
20 knowledge and constituted an important or
21 historical turning point. Therefore, in the case
22 of the appointment of an American counsel to defend

1 a so-called or alleged affil -- a member affiliated
2 with al Qaida, like myself, it becomes impossible
3 for the counsel to put aside his true feelings
4 during the undertaking as an American, himself,
5 which -- who was, in fact, affected by the
6 September 11 attacks. And with respect to the deep
7 psychological scar on the psyche of people and
8 pursuant to the Presidential decrees issued by
9 President Bush and military guidelines in general,
10 according to that, it states that counsel should
11 take up the defense of his -- of the detainees in
12 a -- zealously but within the parameters of the
13 law. I mean, impartial -- because I am from al
14 Qaida and my counsel is an American, therefore, the
15 psychological war is -- or conflict is ongoing and
16 it would be difficult in this age. Real
17 impartiality, regardless of the ground of the
18 counsel and despite the fact that the counsel
19 describes himself as im -- as neutral -- my
20 definition of impartiality, neutrality -- that the
21 counsel totally obliterates the memory of -- of
22 erases the memory of September 11 from his profound

1 psyche so he -- in fact, he has to wear a different
2 persona to accomplish this job in order to defend
3 zealously the client regardless of whether he
4 believes the defendant is guilty or not. And, as a
5 counsel, there is the concept that the defendant is
6 innocent until proven guilty. So, for me,
7 impartiality equates being non-American. That's
8 what I mean.

9
10 Presiding Officer: Okay. I've got a different question,
11 obviously. I've told you that you can ask for
12 another counsel. Have you had a chance to talk to
13 Mr. Fleener?

14
15 ACC: The issue - I do not have a personal objection with
16 respect to the person of Major Fleener. I don't
17 think that the fact of changing the counsel would
18 definitely take care of the issue. My objection
19 has a legal foundation. The right to choose, the
20 free choice of counsel -- for -- a counsel. I'm
21 advocating the right of the defendant to have
22 free -- to have freely a counsel appointed, a

1 counsel that he trusts, that in which he could
2 place his total trust -- in whom he could place his
3 total trust. My objections come from that come
4 that perspective.

5
6 Another cite to the fact which is that the counsel
7 is an American citizen, and from my perspective, it
8 becomes impossible for that -- for the counsel to
9 accomplish his mission or his role in the -- in the
10 spirit of total impartiality. For example, if he
11 asks for -- for the appointment of a Yemeni
12 counsel, would they -- will my -- the request be
13 met?

14
15 Presiding Officer: Mr. Al Bahlul, we are covering areas that
16 we have covered before, but let me tell you one
17 more time. You have Major Fleener. If you want,
18 you may have another military counsel and Major
19 Fleener will be glad to help you find one. You may
20 have a -- and I believe I read this to you before,
21 but I'll read it to you again. You may have a --
22 I'm reading from MCO I -- or paraphrasing it -- a

1 civilian that you choose. A civilian has to be a
2 United States citizen and admitted to practice in a
3 state of the United States.

4
5 Now, if you want Mr. Fleener to see if he can find
6 a United States citizen of Yemeni background to
7 represent you, I would tell you to ask him to see
8 if he can find one. There is a great number of
9 people in the United States and there are many of
10 them who came from Yemen, and I would be surprised
11 if there were not a United States citizen who has a
12 Yemeni background who is a lawyer. But that is
13 something you are going to have to ask Mr -- Major
14 Fleener to find for you. I don't have one. I
15 can't give you one.

16
17 So that's -- that's where we are with the right to
18 attorney.

19
20 And now we get back to my question. Are you going
21 to participate or boycott? I just want to know.

1 ACC: With respect to the hearings and the boycott, in
2 the hearings of 2004, I stated my position clearly.
3 And I think you read my position. The judge read
4 my position. According to what I gathered is that
5 a Yemeni lawyer who has Yemeni citizenship could be
6 appointed as a Legal Advisor , like David Hicks, to
7 Australian counsel.

8
9 Now, we brought up a different point. An American
10 lawyer from Yemeni descent, to have a fair trial,
11 it wouldn't be fair if -- if I would reject and
12 refuse the American counsel and with the excuse
13 that he had -- would have scars resulting from the
14 September 11th; whereas, at the same time, I would
15 accept a dual citizen, an American and Yemini.

16 Other issues could come up, like some kind of
17 national zeal because -- because he's Yemeni and
18 has the American citizenship. And I'm a Yemeni
19 brought to trial under -- for charges of -- so I
20 have to be fair in rejecting both cases and refuses
21 both cases, the American counsel and -- and the
22 Yemeni who has an American citizenship. And you

1 flip the argument and refute -- and just be aware
2 that the argument is flipped, just to be fair, I
3 would not exploit the fact that we have common -- a
4 shared ground between me and him, and maybe he has
5 a bias in a positive way in that case. And we
6 share ethnicity and other -- and religion and other
7 common denominators. As much as I reject the
8 American counsel, I would reject the Yemeni who has
9 an American citizenship or a dual citizenship.

10
11 Will I continue or not? That's another question.
12 Up to this point, we have not resolved the issue of
13 counsel.

14
15 Presiding Officer: Well, so there is no question, we have
16 resolved the issue of counsel. Right now, Major
17 Fleener is your counsel. If you want a civilian
18 counsel, I have told you the requirements that they
19 have to comport with and Major Fleener will be glad
20 to help you see if he can find one. If you want
21 another military counsel, you can have him. He'll
22 be glad to help you find another military counsel.

1
2 If you want a attorney-advisor to assist Major
3 Fleener, someone who is not a U.S. citizen, then I
4 would ask Major Fleener to see if he can find you
5 someone like that. But all of this gets done
6 through Major Fleener.

7
8 ACC: I'm -- after your permission, Your Honor, did you
9 finish?

10
11 Presiding Officer: Yeah.

12
13 ACC: With respect to counsel, I'm saying that Fleener
14 does not represent me. He has just been appointed
15 part of those military procedure. I -- I would not
16 like to -- for us to dwell in a vicious circle.

17
18 Presiding Officer: Good.

19
20 ACC: I do not wish to waste the court's time. I'm
21 saying that I do not want the American lawyer, not
22 civilian and not military. And let's not close the

1 doors in front of compromises. Let's keep some of
2 the windows open. In the hearing of 2004, the
3 judge stated that I had the right to have Legal
4 Advisor join the team.

5
6 Let's suppose that I accepted this proposal of
7 appointing a legal -- a Legal Advisor who happened
8 to be Yemeni and that Mr. Fleener would assist me
9 in finding such a Legal Advisor -- a Yemeni one.
10 And also, in the context that Mr. Fleener is a --
11 is the friend of the court, will this Legal Advisor
12 be allowed to attend the closed hearings where I
13 will be excluded? Because I read the guidelines
14 issued by the Attorney General for the Military
15 Commission and some of the circulars distributed to
16 the military -- to the Commission, the detainees
17 are not allowed to sit in the close hearings.
18 That's with reference to what I read in these
19 proc -- guidelines and regulations, et cetera. And
20 I know that these guidelines go through amendments
21 and update from time to time. If these guidelines
22 that I read are still in place, then the

1 detainees -- the Legal Advisor would not be
2 allowed to attend the hearings side-by-side to the
3 American lawyer in my absence. We are talking
4 to -- we are talking about these closed hearings
5 and the settings.

6
7 Presiding Officer: I understand what you are talking about,
8 Mr. Al Bahlul. And I am not going to speculate
9 right now on what an attorney-advisor could do or
10 not do; although, I believe you are correct that
11 the rules, as written, would not allow him to be in
12 courts until you locate someone who is willing to
13 serve as the attorney-advisor. And the only person
14 who can do that, find such a person for you, is
15 Major Fleener. You have to get these answers from
16 him. That's all -- that's what I can say.

17
18 We have now gone around this question, and I am
19 back to my question. Do you intend to participate?
20 That's all I want to know. I'm not going to force
21 you to participate. You know, it's your trial. If
22 you don't participate, if you sit there with your

1 headsets off -- headset off and do not listen, or
2 if you do not appear at the proceedings, you are
3 going to not know what is happening. And it won't
4 be in the secret that you don't know what is
5 happening, it will be in everything. So, last time
6 you said you are going to boycott, this time I'm
7 asking. Do you want to participate or not?

8
9 ACC: What I must -- don't you qualify this as an
10 interaction? I'm participating. I consider
11 this -- I consider this interaction part of
12 participation. I would like to tell you, Your
13 Honor, during the past time, you indicated that I'm
14 not allowed to go -- to proceed pro se. And up
15 until now, we didn't go in the heart of the trial.
16 And, you know -- and I'm just giving you a
17 little -- a small flavor of how I could represent
18 myself. Basically, it comes down to I'm going
19 ahead pro se now, something outside the trial
20 itself in citing the evidence and cross-
21 examination, et cetera. And I'm using the line --
22 a clear line of argument and common sense and other

1 tools, and in a manner that basically guarantees
2 respect to the Commission and to the proceedings,
3 et cetera, and to those who are in the courtroom as
4 well. I believe that I will be cool-headed in
5 going ahead and representing myself. I believe
6 that I'll be bet -- I will be better off if I
7 represent myself.

8
9 So with reference to this hearing, one more time, I
10 renew my request. I -- I put to motion -- I submit
11 a motion to Your Honor, and maybe you could consult
12 with his superiors to allow me to represent myself
13 and to basically review -- reconsider their
14 decision -- reconsider the decision that I am not
15 qualified to represent myself. And, Your Honor,
16 you witnessed by yourself, my -- the clarity of my
17 argument and the tools -- the common sense tools
18 and other tools that I used.

19
20 So, Your Honor, how do you expect from a person who
21 announced clearly to the entire world in 2004 --
22 August 2004, with all audacity and moral audacity

1 and not for political -- and not for political
2 reasons, I told that statement in 2000. I said
3 that statement in 2004. And following that, I
4 reiterated that outside the courtroom. I foll -- I
5 followed up with letters sent to KSM, Kalid Sheikh
6 Muhammad, and Ramzi bin al Shibh, the direct and
7 responsible for the carrying out of September 11th.

8
9 So all -- all what I'm trying to say to inform the
10 higher echelons to allow me to represent myself in
11 the trial and in citing and showing evidence, et
12 cetera, and I'm guaranteeing -- I'm given assurance
13 that I will be calm -- I will observe calm exam.

14
15 I -- would you allow me to proceed? I -- I -- if
16 you -- would you like to interrupt me? I -- I did
17 not -- I had the impression that you wanted to say
18 something, Your Honor. I did not want to interrupt
19 your ideas.

20
21 Presiding Officer: Mr. al Bahlul, I have -- no. The court's
22 in recess for ten minutes.

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The Commissions hearing recessed at 1438, 1 March 2006.

*The Commissions hearing was recalled to order at 1455, 1
March 2006.*

Presiding Officer: The Commission will come to order.

PROS: All persons who were present when the Commission
recessed are present again, Your Honor.

Presiding Officer: Okay. Mr. al Bahlul, so there is no
question, I'm going to cut you off now. I've heard
nothing today that would cause me to change my
prior ruling. You will not be permitted to go pro
se. You are represented by Major Fleener, and
you've got to work with him and through him to
present a defense. If you want to have an attorney
advisor assist Major Fleener, tell him. It will be
up to him to help you locate such a person.

ACC: Are you waiting for an answer from me, Your Honor?

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Presiding Officer: No, thank you.

ACC: You had asked me about my boycotting status, and
 you have not -- and I have not replied yet.

Presiding Officer: Okay. If you may answer yes or no, are
 you going to boycott or participate? Is that a yes
 or a no?

ACC: In regards to the court, yes, I am boycotting; but
 I still have something that I need to explain.

Presiding Officer: No, thank you, Mr. al Bahlul.

ACC: I am still boycotting the court.

Presiding Officer: Thank you, Mr. al Bahlul.

 Okay. The current POM listing as of the latest POM
 change on 16 February is RE-157. The current
 filings inventory is RE-164. RE-140 through RE-164

1 have been added since the last session.

2
3 At our last session, I gave the defense leave to
4 postpone voir dire since you weren't prepared to do
5 so or proceed at that time, Major Fleener. I
6 authorized you to submit some questions in writing.
7 You did so. The questions and the matters can be
8 found at PO -- in the PO 103 filings, and my
9 responses are at RE-156. Keeping in mind MCI 8 and
10 MCO 1 and the Appointing Authority's Memorandum,
11 Major Fleener, of 19 October 2004, do you have any
12 further voir dire?

13
14 DC: First, sir, I move to withdraw.

15
16 Presiding Officer: Okay. What is your basis, Major Fleener?

17
18 DC: Mr. al Bahlul has released me as his attorney. I
19 don't have the authority to act on his matter.

20
21 Presiding Officer: Okay. Do you have anything more than
22 we've been through this before, Major Fleener?

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DC: I was thinking that Mr. al Bahlul's conversation with Your Honor may have certainly changed some of the findings and fact and conclusions of law that you entered into on -- that you entered in on January, sir.

Presiding Officer: Okay. Did you hear what I said when I came in? I've heard nothing to change my prior ruling.

DC: Yes, sir. And I still move to withdraw.

Presiding Officer: Okay. Do you have any other basis than you've presented before?

DC: No, Your Honor.

Presiding Officer: Okay. Your motion to withdraw is denied.

DC: Your Honor, I don't believe I should be forced to be this man's attorney.

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Presiding Officer: Why not?

DC: Because it doesn't comport with domestic law,
 international law, any sort of law other than
 Mr. Altenburg's law.

Presiding Officer: Major Fleener, did you receive an opinion
 from the Iowa Bar on your request to withdraw?

DC: I did.

Presiding Officer: And what did they say?

DC: The Iowa Bar said that I may represent Mr. al
 Bahlul.

Presiding Officer: Thank you. You have been detailed to
 represent Mr. al Bahlul. Do you agree with that?

DC: I have, sir.

1 Presiding Officer: Okay. SOCO, the Army said, that you may
2 represent Mr. al Bahlul and Iowa says you may
3 represent Mr. al Bahlul. You don't want to
4 represent Mr. al Bahlul, and I'm not saying that I
5 don't understand some of your concerns. However,
6 that's your job and your motion to withdraw is
7 denied.

8
9 DC: Sir, I prepared written voir dire questions for
10 you, and Your Honor responded. I have more
11 questions for you.

12
13 Presiding Officer: I failed to note for the record that
14 after Mr. al Bahlul said he was boycotting, he took
15 his headsets -- his headphones off and put them on
16 the table in front of him. Now, they're back on.
17 Okay. Go on.

18
19 DC: Sir, where do you currently live, in what state of
20 the union?

21
22 Presiding Officer: Not relevant.

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DC: Why is that not relevant, Your Honor?

Presiding Officer: Because I say it's not relevant. Please
read the MCI. What possible relevance can it have,
any bias I have against Mr. al Bahlul.

DC: Maybe you live in Afghanistan; and if that -- in
that case, there might possibly be bias. You might
live in New York right by the World Trade Center
and in that case, you might be bias.

Presiding Officer: If I thought my answer was relevant, I
would say it, but it's not relevant.

DC: Your Honor, you're not allowing me to explore basis
for challenging you for cause, and that's an abuse
of discretion. If we're going to apply the -- I
don't know if the UCMJ applies or military law
applies. It appears to apply sometimes and not
other times. 30 M.J. 631, *United States versus
Smith*, the court essentially held that you abuse --

1 the military judge abused his discretion in
2 limiting the scope of voir dire to prevent the
3 defense counsel from developing possible grounds
4 for disqualification.

5
6 Now, if you're a military judge, I should be
7 allowed to explore these areas. I don't know
8 whether you're a military judge in this capacity or
9 not. It's sort of sometimes you are, sometimes
10 you're not. So I think you should be answering
11 these questions, sir.

12
13 Presiding Officer: Well, I appreciate what you think. I've
14 told you that it's not relevant.

15
16 DC: So the record can be clear, I think it's relevant
17 so that Mr. al Bahlul can have a full and fair
18 trial, part of Mr. al Bahlul's -- the President's
19 directive that Mr. al Bahlul is entitled to a full
20 and fair trial would indicate that the Presiding
21 Officer is competent, qualified, and unbiased,
22 neutral, and independent. I believe that asking

1 that question would lead grounds to disqualifying
2 you on at least one of those five grounds.
3

4 Presiding Officer: Pardon me? Would you say that again.
5

6 DC: I believe that, your Honor, by answering that
7 question, it may lead -- give -- may lead to
8 grounds to disqualifying you on one of those five
9 grounds.
10

11 Presiding Officer: Do you have any reason for stating that
12 belief?
13

14 DC: Same case, Your Honor, *United States versus Smith*.
15

16 Presiding Officer: You're telling me that a military judge
17 in the case of *Smith* refused to state where he was
18 living and that was grounds for disqualification?
19

20 DC: No, sir. He -- it was a failure to state something
21 else, sir.
22

1 Presiding Officer: Well, then please try to keep your
2 comments correct; however, I understand your
3 comment, that you want me to answer it, and I'm not
4 going to. Go on. I keep pointing to the trial
5 counsel and pushing him down. Go on.

6
7 DC: Where are you currently assigned? You said RE-138.
8 I note that RE-138 is a 55-page document, and --
9

10 Presiding Officer: I'm assigned to the Office of Military
11 Commissions in the Department -- the Office of the
12 Secretary of Defense.

13
14 DC: Okay. Who is your current supervisor? You said,
15 "I have none." Do you truly have no supervisor?
16

17 Presiding Officer: None.
18

19 DC: Do you receive evaluation reports, sir?
20

21 Presiding Officer: No.
22

1 DC: You report to no one?

2

3 Presiding Officer: No one.

4

5 DC: Who signs your leave forms if you were to take
6 leave?

7

8 Presiding Officer: That's not relevant. Go on.

9

10 DC: I think it's relevant because it would establish --
11 I'm just making a proffer, sir.

12

13 Presiding Officer: Okay. You may -- go on. What's your
14 proffer?

15

16 DC: I believe who you work for, where you work, and who
17 your supervisor may or may not be is relevant to
18 determine whether you are independent or not or
19 whether you are part of the Office of Military
20 Commission who is run by Mr. Altenburg.

21

22 Presiding Officer: Okay. Go on.

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DC: Other than -- is it safe to say that your military duties consist of the four cases that are currently given to you?

Presiding Officer: Generally, yes.

DC: In 2005, did you ever have occasion to come to Guantanamo, Cuba -- Guantanamo Bay?

Presiding Officer: Yes.

DC: How many times, sir?

Presiding Officer: I'm not sure, three, four, five, something on that order.

DC: There is another basis on my question of where do you currently live. I would like the record to be clear: I also think that you may be subject to wherever you are practicing or not practicing, if this is considered practice of law, you may be

1 subject to restrictions in whatever state that may
2 be, sir.

3
4 Presiding Officer: Okay. Do you know what state I'm
5 licensed in?

6
7 DC: I do, sir.

8
9 Presiding Officer: Okay. Go on.

10
11 DC: As an associate member of the Virginia Bar, you
12 don't have to do any CLE?

13
14 Presiding Officer: Correct.

15
16 DC: An active member does?

17
18 Presiding Officer: I imagine.

19
20 DC: Why have you not chosen to be an active member of
21 the bar?

1 Presiding Officer: I don't choose to practice law in
2 Virginia.

3
4 DC: Are you aware of a Virginia ethics opinion
5 regarding the unauthorized practice of law for
6 military lawyers?

7
8 Presiding Officer: No.

9
10 DC: May I approach?

11
12 Presiding Officer: What is -- well, now, what does it say?
13 Just tell me what it generally is about.

14
15 DC: Thus that the only bar membership maintained by the
16 attorney, his associate status in the Virginia
17 State Bar with no active membership in any other
18 state, it is the committee's opinion that the
19 attorney may engage -- may not engage in the
20 practice of law, signed April 20th, 1989, by the
21 Virginia State Bar Membership Committee.

22

1 Presiding Officer: Have you done any further research on
2 that, Major Fleener, before you put that out on the
3 record?

4
5 DC: I've done as much research as I can, sir.

6
7 Presiding Officer: Okay. Well, if you want to, you may --
8 please mark that as the next RE in line on the
9 record. Go on.

10
11 DC: Yes, sir.

12
13 Presiding Officer: You may approach and give it to her.

14
15 DC: Thank you, sir. I'm sorry. I didn't make copies
16 for the United States.

17
18 *The court reporter marked the exhibit.*

19
20 Presiding Officer: Continue. That is RE-165.

21
22 DC: Have you had three hours of annual training

1 regarding the professional rules of conduct for
2 Army lawyers this year, sir?

3
4 Presiding Officer: In 2006?

5
6 DC: Yes, sir.

7
8 Presiding Officer: No, I haven't had it in 2006.

9
10 DC: Did you have it in 2005, sir?

11
12 Presiding Officer: I don't know.

13
14 DC: Did you have it in 2004, sir?

15
16 Presiding Officer: I don't know. That's my answer.

17
18 DC: Are there any records that you would possess that
19 would have that information, sir?

20
21 Presiding Officer: Not that I'm aware of.

1 DC: Did you attend any CLE's that had ethics as part of
2 the course of instruction?

3

4 Presiding Officer: You would have to look at the TJAG's Law
5 of War Course. I don't know if they did or not.

6

7 DC: Was that the only CLE that you took since you've
8 been activated --

9

10 Presiding Officer: Yes.

11

12 DC: -- back on active duty?

13

14 Presiding Officer: Yes.

15

16 DC: Did you attend the alternate -- and I say -- I ask
17 this question like I know because I went to the
18 course last week -- or last month rather. Did you
19 attend the alternate -- or the available hour or
20 two of ethics during lunch? Do you know?

21 Presiding Officer: I don't remember.

22

1 DC: Would you agree that it's important for a Presiding
2 Officer of the Military Commissions to be up to
3 date regarding ethics training?
4

5 Presiding Officer: I'm not sure that I would agree with what
6 you just said. I would say it's important for the
7 Presiding Officer of a Military Commissions to
8 be -- to practice ethically.
9

10 DC: When you were a member of the trial defense service
11 in 1980 -- you were the Operation's Officer for the
12 United States Army Trial Defense Service from 1981
13 to 1984; correct, sir?
14

15 Presiding Officer: Yup.
16

17 DC: Did you practice law in that capacity?
18

19 Presiding Officer: Yes.
20

21 DC: Was the Trial Defense Service located in Falls
22 Church, Virginia?

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Presiding Officer: Yes.

DC: And it is true -- is it not -- that the -- that in
 1981 through 1984, you were an associate member of
 the Virginia Bar and that is all?

Presiding Officer: Yes.

DC: You got this position as a Presiding Officer based
 on -- well, I'm reading from RE-138 again which is a
 55-page exhibit. And in that exhibit Colonel
 Brownback went into detail regarding relationships
 and how he got places. Did you -- you said in here
 that you sent Mr. Altenburg an e-mail congratulating
 him on his selection as the Appointing Authority. Do
 you recall that, sir? I think it's on Page 11, sir,
 first paragraph. No, I take that back. It's in --

Presiding Officer: On Page 6 of RE-138, Paragraph 7 thereof,
 I state, "I sent him an e-mail in December 2003
 when he was appointed as the Appointing Authority."

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DC: What did you say in that e-mail, sir, to the best
 of your recollection?

Presiding Officer: Congratulations on being appointed as the
 Appointing Authority.

DC: Now, when you said congratulations on his
 appointment, you had already put your name in to
 the Chief Trial Judge that you were interested in
 being a Presiding Officer; correct, sir?

Presiding Officer: No. She had already asked me if I wanted
 to, if I was interested.

DC: Right. In January of 2003 -- I'm looking at Page
 10, sir.

Presiding Officer: Right. That's a different matter. She
 called me not vice versa. Go on.

DC: Okay. And you told her that you were interested --

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Presiding Officer: Right.

DC: -- and put a statement in?

Presiding Officer: Uh-huh.

DC: After you sent a statement in saying that you were interested in being a Presiding Officer of the Military Commissions, what happened next regarding your selection, sir?

Presiding Officer: According to Page 11 of RE-138, in January of 2004, I received a call from the Chief Trial Judge's Office to find out if I, among others, was still interested, and I said I was.

DC: But a month earlier you had sent Mr. Altenburg an e-mail congratulating him on his selection as the Appointing Authority, sir.

Presiding Officer: That's right. You've already said that.

1 Go on.

2
3 DC: I have reviewed the transcripts from some of the
4 other hearings that you did, sir, in 2004. There
5 are apparently 33 others that were in line that had
6 volunteered to be Presiding Officers.

7
8 Presiding Officer: That's what someone said. I don't know.

9
10 DC: Mr. Altenburg selected you as the Presiding
11 Officer.

12
13 Presiding Officer: If you read Paragraph 7 of RE-138, you'll
14 find out everything I know about the selection
15 process. I imagine that since Mr. Altenburg was
16 the Appointing Authority and he appointed me that
17 he selected me, yes.

18
19 DC: Do you consider Mr. Altenburg a friend?

20
21 Presiding Officer: Sure. Yes, I do.

1 DC: You would -- do you believe he considers you a
2 friend?

3

4 Presiding Officer: Yeah, I think so.

5

6 DC: And I'm not -- this has been -- and procedurally,
7 sir, because I'll still trying to figure out the
8 process, is this part of the record? Is this an
9 exhibit on an RE?

10

11 Presiding Officer: That's why it's called RE-138. Yes, it's
12 an RE. And my questions -- your questions to me
13 that I answered are RE-156.

14

15 DC: Is it safe to say that when I -- if and when the
16 issue involving your -- whether you should be
17 challenged or not challenged is briefed to the
18 Appointing Authority, citing one of the RE's is
19 going to be sufficient at least to include the
20 Appointing Authority into the fact or do I need to
21 repeat this stuff? Is --

22

1 Presiding Officer: They're all on the record.

2

3 DC: Okay, sir.

4

5 Presiding Officer: The RE-138 and RE-153 are both part of
6 the record.

7

8 DC: Okay, sir. The reason why I ask is the
9 transcript -- they weren't my transcripts. They
10 came from some other hearings. I don't know if I
11 needed to go over the questions again or --

12

13 Presiding Officer: No. That's why I put it into RE-138 and
14 provided it to you.

15

16 DC: Yes, sir.

17

18 Presiding Officer: So it would all be there.

19

20 DC: Do you believe that you have the ability as the
21 Presiding Officer to disagree with Mr. Altenburg
22 regarding an order or a regulation or an opinion

1 that he -- he or his office offers? And I mean
2 disagree, rule opposite.
3

4 Presiding Officer: That's a different question then you
5 asked it in Number 135 on RE-156. If I were to
6 find that something that Mr. Altenburg issued was
7 contrary to the PMO or the MCO, yes, I do agree. I
8 do agree. I do think I do.
9

10 DC: You think that you would be able to not follow
11 Mr. Altenburg?
12

13 Presiding Officer: Yes.
14

15 DC: Do you believe these proceedings are guided by
16 anything other than the President's Military Order,
17 the Military Commission Order, the Military
18 Commission Instructions, the Appointing Authority
19 Regulations, the Presiding Officer Memorandums,
20 which is commonly -- I guess referred to yesterday
21 as Commission Jurisprudence?
22

1 Presiding Officer: Commission law, but that's okay.

2

3 DC: Do you believe that you can look to any other
4 source of law to make decisions or are you bound by
5 this --

6

7 Presiding Officer: Okay. How about if we look at it this
8 way, Major Fleener --

9

10 DC: Yes, sir.

11

12 Presiding Officer: -- I'm an Army Officer like you are, and
13 I raised my right hand to defend and preserve the
14 Constitution of the United States. I've also taken
15 an oath as the Presiding Officer. I've taken an
16 oath as a Commissioned officer. My duty, as I see
17 it, is to carry out the President's instructions to
18 have a full and fair trial. The starting point for
19 anything here is what we are established under, the
20 PMO and the derivative regulations and whatever.

21

22 If counsel for either side were to say "X" is

1 wrong, then I would listen to the counsel's
2 arguments and make my own determination as to what
3 is correct or not correct.

4
5 The immediate rule is the PMO. I am not willing to
6 state, since it has not been before me yet, what,
7 if any part of the PMO, one could consider not
8 proper because I don't know. And if you want to
9 say part of the PMO is wrong or part of the MCO 1
10 is wrong or MCI is wrong, fine. Brief it and tell
11 me. Okay. That's my answer.

12
13 DC: Yes, sir. And I'm trying to figure out whether you
14 are going to be -- respectfully, this thing has
15 changed a little bit and your role apparently is
16 changing as, at least, as the Military Commission
17 Order has changed your role since Mr. al Bahlul had
18 his first session. And I'm trying to understand
19 what that role is, whether that role -- what the
20 MCO 1, the new MCO believes that role to be and
21 whether -- because it may place you in a different
22 category, and I think you can probably understand.

1 Whether you are a juror, or a judge, a quasi judge,
2 it's evolving.

3
4 So I ask these questions about where you're
5 reaching to get guidance in law because there is a
6 difference between a -- well, whether Mr. Altenburg
7 is like an appellate court or whether Mr. Altenburg
8 is some other sort of body and what your role in
9 this could affect the relationship and could affect
10 your ability to be either neutral, detached,
11 impartial, or biased, or unbiased, or independent.
12 That's why I'm trying to explore this, sir.

13 Presiding Officer: Okay. If you look back in September of
14 2004, I sent up five interlocutory questions to Mr.
15 Altenburg. I got back five answers which are in
16 the records of trial in *Hamdan* and *Hicks*, I'm
17 certain. Those questions were basically on
18 procedural matters. If you read the MCI and the
19 MCO, I am allowed to send up interlocutory
20 questions. I haven't done any since September of
21 2004, but I'm allowed to.

22
23 If I send one up, that is probably because I have a
24 question in an area that he might know. I think

1 one of the interlocutory questions was, can we have
2 a meeting of the panel in CONUS and the answer was,
3 no, you can't. What the heck. But if you're
4 asking if my knowledge of Mr. Altenburg would make
5 me say "airborne, airborne, three bags full"
6 whenever he says something, the answer is no.

7
8 DC: I don't even know if you have the authority to say
9 no or say yes. That's why I'm trying to explore
10 the relationship because the relationship has
11 changed since Mr. al Bahlul sat here a year ago.
12 When Mr. al Bahlul set here a year ago, all the
13 members were here.

14
15 Presiding Officer: I was here.

16
17 DC: I wasn't.

18
19 Presiding Officer: I know.

20
21 DC: I was the only one. They weren't here either.
22 They had a different team. But this has changed

1 fundamentally since 2004 -- or since he sat here in
2 August 2004, and people's roles have changed. And
3 I'm trying to explore the relationship of the roles
4 and how it would comport with a full and fair trial
5 and how it would comport with your ability as a
6 Presiding Officer to be neutral, detached,
7 independent, unbiased.

8
9 Presiding Officer: Okay.

10
11 DC: Do your -- I asked in RE-138 what your parents did
12 professionally, what your brothers and sisters did
13 professionally, and your children do professionally;
14 and you said that was not relevant. I assume you
15 still believe that?

16
17 Presiding Officer: Yup.

18
19 DC: Okay. And I believe it is relevant because I
20 believe that they may have jobs which would -- or
21 they could have jobs which would place them in a
22 position where it would at least appear that you

1 are either actually -- have actual bias in some
2 form or at least that there would be the appearance
3 that you are too close based on a particular
4 relationship of one of your children. I can't
5 explore that. I believe I should be able to, but I
6 will move on, sir.

7
8 Page 4, sir, Question 22, I asked, "Have you ever
9 spoken with any Presiding Officer about the Law of
10 War, Military Commission?" "Yes." "Please
11 advise." And you said, "It wasn't relevant." Why
12 is that not relevant, sir?

13
14 Presiding Officer: Because my conversations with other
15 Presiding Officers is not relevant.

16
17 DC: Do you believe they're privileged?

18
19 Presiding Officer: Yes, I do.

20
21 DC: Under what privilege?

1 Presiding Officer: Brief it. There. I'm telling you I
2 believe they are privileged. I put this into my
3 response to -- or to my answer to D101, which
4 was -- my answer was D101(B). You may look at
5 that.

6
7 DC: I'm sorry, sir? What was the page?

8
9 Presiding Officer: D101 Bravo.

10
11 DC: In this case, sir, or is it in another case?

12
13 Presiding Officer: Turning to D101 Bravo, looking at
14 Paragraph 2B, I state, "This request assumes,
15 without further explanation, the writings and the
16 communications among, between the Presiding
17 Officers and the Assistant are subject to
18 disclosure without regard to privilege. In view of
19 the ruling in 3(B)2 below and given the failure of
20 the defense and prosecution to brief the issue, the
21 general issue of privilege need not and will not be
22 fully developed in this opinion; although, it was

1 addressed in Paragraph 3 Bravo 1 below." In 3
2 Bravo 1, I state, inter alia, "The Commission
3 concludes that adjudicative advice from the
4 Assistant to a Presiding Officer is privileged."

5
6 DC: Thank you, sir. I'm just trying to -- what is D101
7 Bravo, sir? Is it in my case? Is it in al
8 Bahlul -- not my case, but this case?

9
10 Presiding Officer: D101 Bravo, as I stated before, Major
11 Fleener, is my ruling on your motion to preserve
12 evidence. And if you look at the filings
13 inventory, you will find that it's at RE-154.

14
15 DC: Suffice it to say, you want it briefed?

16
17 Presiding Officer: Pardon?

18
19 DC: I said, suffice it to say you would like this
20 briefed if I want to raise the issue?

21
22 Presiding Officer: Well, no. Have you found it yet?

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DC: No, sir.

Presiding Officer: Okay. If you don't believe my communications are privileged, then you can make a brief on that; but I raised the issue and noted that no one else cared about it, so there. Okay.

DC: During your period of retirement, sir, what jobs did you perform?

Presiding Officer: I referred you to RE-138. I once again refer you to RE-138, specifically Page 8.

DC: This apparently lists three jobs. You were a census enumerator. As a census enumerator, did you have any experience -- were you -- that wasn't a practice of law, sir, I assume?

Presiding Officer: Okay. None of this was the practice of law.

1 DC: Okay. Did you do anything either in the census,
2 the safety person for the beach renewal operation,
3 or the instructor for the SAT course, or an
4 instructor at a local college, did you do -- did
5 any of those -- did any of those require any use
6 of -- well, none of those involve the practice of
7 law.

8
9 Did any of them involve anything that you would
10 consider to be beneficial to your role as the
11 Presiding Officer here helpful or not helpful?

12
13 Presiding Officer: I don't -- I can't answer that question
14 because I don't understand it.

15
16 DC: Were you staying up with the law between 1999 and
17 2004, sir?

18
19 Presiding Officer: Yes.

20
21 DC: In what way, sir?

22

1 Presiding Officer: Reading.

2

3 DC: Were you -- what course did you teach at the local
4 college, sir?

5

6 Presiding Officer: What relevance does this have? And I'm
7 serious.

8

9 DC: I don't know what course you taught. Were you --

10

11 Presiding Officer: Well, no. I want to know what relevance
12 what I taught has.

13

14 DC: You may -- I don't know. You may have taught --
15 sir, you may have taught introduction to
16 interrogation techniques --

17

18 Presiding Officer: Okay. I didn't teach any course --

19

20 DC: -- at the local --

21

22 Presiding Officer: -- that had any relevance to the Military

1 Commissions.

2
3 DC: I'm sorry, sir?

4
5 Presiding Officer: I said, I didn't teach any course that
6 had any relevance to the Military Commissions.

7
8 DC: Nothing that involved criminal law at all or
9 working with a criminal justice degrees, how to
10 interrogate people, how to do search and seizures?
11 Anything like that, sir?

12
13 Presiding Officer: Yeah. I taught some criminal law
14 courses, nothing to do with this.

15
16 DC: And what courses did you teach, sir?

17
18 Presiding Officer: I don't remember. Okay. Major Fleener,
19 I referred you when we started here to MCI 8. I
20 want you to narrowly focus your questions. You're
21 not narrowly focusing them, and I am not able to
22 see what relevance this has.

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DC: Respectfully, sir, I sent my 15 pages or so of
 written voir dire and almost every answer was "not
 relevant, RE-138."

Presiding Officer: Well, Major Fleener, if you'd read
 RE-138, I wouldn't have to refer them to you,
 but -- when we go through this. If -- I am not
 aware of the list of courses I taught. They were
 general criminal and commercial law courses, you
 know, but not to law students.

PROS: Your Honor, may we take a comfort recess while he
 gathers his thoughts and narrows his questions?

Presiding Officer: Ten minutes.
The Commissions hearing recessed at 1542, 1 March 2006.
The Commissions hearing was recalled to order at 1552, on 1
March 2006.

Presiding Officer: The Commission will come to order.

1 Please account for the parties again.

2
3 PROS: All parties who were present before the recess are
4 present again, Your Honor.

5
6 Presiding Officer: Okay. Go ahead, Major Fleener.

7
8 DC: The Army Court of Criminal Appeals recently -- not
9 too recently I guess -- affirmed in part and set
10 aside in part the case of *United States versus*
11 *Kreutzer*. That's K-R-E-U-T-Z-E-R. I have a few
12 questions about that, sir.

13
14 Presiding Officer: Okay.

15
16 DC: You were the trial judge -- the trial judge in that
17 case sir?

18
19 Presiding Officer: Yes.

20
21 DC: And in that case, is it safe to assume that you
22 read the Army Court's opinion?

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Presiding Officer: Yes.

DC: There were several issues that the Army Court addressed in that opinion regarding why they set aside part of the case at least. A couple of the reasons that had been -- that were mentioned were that there were excessive pre-trial conferences, that it appeared that you had forced the defense attorneys into court faster than they were apparently ready for -- or faster than they were able to be competent at, and that you did not allow a mitigation expert to assist the defense in preparing for trial.

Would you agree that the Army Court was critical on those three matters, sir?

Presiding Officer: I would agree that the Army Court stated that I should have required the Convening Authority to provide a mitigation expert. I do not remember the portion about forcing the counsel to go to

1 court too soon, but I presume you're looking at it,
2 and it's a matter of public record. Go on.

3
4 DC: Sir, did -- and I'm trying to pick my words
5 carefully because you are back on active duty now,
6 so am I. Assuming that the Army Court was correct
7 and that there was error -- and I guess we could
8 assume it from the fact that they found this but
9 that doesn't mean it -- we may disagree whether it
10 actually happened or whether it's true or not. But
11 assuming all of it is true and that you should have
12 granted a mitigation specialist -- or mitigation
13 expert in that case to assist the defense and that
14 you should have not had pre-trial conferences as
15 many you may have had, and that the defense
16 attorneys that you should not have moved them
17 forward as fast as at least they allege that they
18 were moved forward, did you -- assuming that's
19 true, have you learned anything from that
20 experience? Is your practice in court today going
21 to -- or in Commission today, going to be different
22 now based on the rulings of A.C.C.A. in *Kreutzer*,

1 sir?

2
3 Presiding Officer: As I said to Mr. al Bahlul earlier, "once
4 burned, twice shy." The two primary reasons for
5 the rulings for -- that I'm aware of in *Kreutzer*
6 was failure to appoint a mitigation expert or to
7 direct that one be appointed and ineffectiveness of
8 counsel.

9
10 DC: Yes, sir.

11
12 Presiding Officer: Those were the two that I remember, and
13 I'm not -- we're not doing a law review article. I
14 will say that I tried *Kreutzer* in June of 1996.
15 The A.C.C.A. came out with their opinion in 2003.
16 So, yes, I have learned -- I have learned from
17 that. I learned more from the C.A.A.F. opinion
18 than I did from A.C.C.A. opinion, but, yes, I've
19 learned from it.

20
21 DC: There is one particular issue in the case, sir,
22 that I'd like to talk about because it may come up

1 again, and it is -- I think it's important. I'm
2 going to read one footnote, Footnote 4, and it's
3 not -- this is nothing disparaging to you, sir, but
4 it's an issue that's going to come up in this case
5 probably. This is the classic defense -- this is a
6 classic military defense counsel dilemma. They're
7 speaking about expert assistance and how trying to
8 get expert assistance, the hurdles are so high you
9 have to -- the hurdles to get expert assistance or
10 the barriers are tough to overcome as a defense
11 attorney. "The best way to articulate and explain
12 the need for an expert is by using just such an
13 expert to describe their evidence, analysis, and
14 development process. But experts who are not
15 already employed by the government charge fees for
16 these services, and detailed defense counsel
17 normally do not have access to money to pay for
18 such initial services in order to obtain the
19 preliminary consultation in order to get the
20 expert."

21
22 Do you recognize that dilemma exists, sir?

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Presiding Officer: Yes, I do.

DC: You said that during your period of retirement that
 you were staying up with the law by reading. What
 were you reading, sir?

Presiding Officer: Almost all of the Supreme Court Cases,
 circuit court cases I felt interested in, all of
 the C.A.A.F. cases, certainly all of the opinions
 of the court from A.C.C.A., and most of the
 memoranda opinions.

DC: There were -- I need to get a bigger table. You
 had two jobs that when I asked questions you said
 weren't relevant. I'm going to ask the questions
 again because I think they might be relevant and --
 well, I think they are relevant actually because
 they may be grounds to -- we may draw a basis for
 grounds for challenge. Specifically regarding what
 your duties entailed at the JFK Center for Special
 Warfare.

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Presiding Officer: I was the Legal Advisor to the Commander of the Special Warfare Center. I was an instructor at the school teaching general military legal courses.

DC: Yes, sir. When you were at -- actually I've got that here. I'm sorry. There was a mistake, and there's actually a whole period of work from '84 to '92 essentially I think that is relevant here. When you were also the Legal Advisor for the Joint Special Operations Command, what type of issues did you advise on, sir?

Presiding Officer: International law, any criminal law that might come up, how to plan, you know, various things, training, you know.

DC: Do you remember any particular international law issues that may have come up?

Presiding Officer: No.

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DC: Do you remember any particular issue at all that may have come up when you were at the Special Operations Command, sir?

Presiding Officer: I remember some problems involving property damage, but they weren't international law related. They were what the troops did.

DC: In a foreign country though, sir?

Presiding Officer: No. Here in CONUS.

DC: Yes, sir. The -- you were also the Director of Legal Operations for JSOC. That's the Joint Special Operations Command, sir?

Presiding Officer: Yeah.

DC: That job was different than being the Legal Advisor, sir, earlier?

1 Presiding Officer: It meant I was a full Colonel at that
2 time. I was only there for three months. What did
3 I say in there? January? I was there from January
4 to March before I went to Saudi as the SJA there.

5
6 DC: Do you believe there is anything that you did when
7 you were -- just in those three months at JSOC --
8 that would have some importance if a third -- a
9 reasonable person sitting on the outside were to
10 hear about your qualifications for these
11 Commissions, do you think anything you did in those
12 three months would be --

13
14 Presiding Officer: No, I don't think so.

15
16 DC: Yes, sir. You were the SJA of the 22d Support
17 Command Forward, yes, sir? Correct?

18
19 Presiding Officer: No. I was the SJA of the 22d Support
20 Command in Dharan, and I was dual-hatted as the --
21 because my boss was dual-hatted -- as the SJA of
22 the 3d Army Forward in Dharan.

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DC: Was this during Gulf One or Desert Storm One?

Presiding Officer: No. I got there in May of '91, right afterwards.

DC: Okay.

Presiding Officer: During the Gulf War, I was trying cases. I was a judge.

DC: Yes, sir. What type of issues did you encounter, international law issues or issues that might be relevant to these types of these proceedings did you encounter when you were the SJA dual-hatted in Dharan?

Presiding Officer: I'm laughing because the issues I encountered -- you asked somewhere else if I had to deal with Law or War.

DC: Yes, sir.

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Presiding Officer: I never tried a Law of War case, and I didn't do it -- one there. But we had the basic, yeah, what do you with all the stuff that was left over from the Gulf War? We were trying to get rid of material. We were trying to clean up the desert. You know, we had people -- they had two people who got in a HMMV and drove to Baghdad. You know, what do you do with them? Well, I don't know, sir. You tell me. So, yeah, we -- there were no -- there were no issues that involved anything other than your basic trying to close down a huge operation in Saudi Arabia.

DC: Did you have to deal with detainees or detainee affairs at all?

Presiding Officer: During the Gulf War, we had seized thousands, tens of thousands, hundreds of thousands of prisoners. In a general way, the SJA for the 800th MP Brigade, EPW, Enemy Prisoner of War, would ask me questions. I'm sure he asked me some

1 questions. I don't remember. You know, hey, we've
2 got all of these watches. What do we do? You
3 know, I don't remember anything that he dealt with
4 that had to do with specifically detainees. We're
5 talking just major issues. Sorry.

6
7 DC: I was in college. I don't know happened to
8 detainees after the Gulf War.

9
10 Presiding Officer: We tried, as best I remember, to return
11 them as soon as possible. We had -- we captured
12 many of them, and I believe -- although I'm quite
13 prepared to be corrected -- that they were
14 generally returned by the 1st of June or July of
15 '91. But we're using -- I'm using the term
16 "detainees" to refer to all the people we policed
17 up.

18
19 DC: Yes, sir. Do you believe, sir, that -- well, I --
20 no one knows how to address this issue since there
21 have been no cases. Do you believe personally that
22 evidence that is derived from torture or coercive

1 involuntary means should be used in any court
2 system assuming -- well, I know they wouldn't be
3 used in a real -- I don't want to say real court --
4 in a court, but do you think that evidence derived
5 from torture should be used in any sort of
6 proceeding personally, regardless of what the law
7 stands?

8
9 Presiding Officer: Okay. Major Fleener, we have a problem
10 here because --

11
12 DC: Yes, sir.

13
14 Presiding Officer: -- what you and I mean by torture may be
15 different. But let's talk -- let's just say that,
16 Brownback, do you believe that evidence obtained by
17 poking someone in the eye with a red hot needle,
18 you'd agree that's generally torture, wouldn't you?
19 You?

20
21 DC: Me personally?

1 Presiding Officer: Yeah, you.

2

3 DC: Yes.

4

5 Presiding Officer: Okay. Well, I'll agree that's torture
6 too.

7

8 DC: I have a low threshold though, so you're going to
9 have --

10

11 Presiding Officer: Okay. Well, we're -- but we've crossed
12 it I hope. Do you believe that personally that
13 that should be used in evidence? Given my almost
14 29 years as a practicing American lawyer in the
15 U.S. system, my over 20 years of practicing law in
16 the Military Justice System, my own personal
17 beliefs, my own feelings, my personal belief is
18 that torture is not good.

19

20 DC: I would agree with you, sir.

21

22 Presiding Officer: Okay. Now, if you then want me to say

1 anything else, you're going to have to brief it.
2 But I'm telling you that that's where I can go with
3 you now. I don't -- I don't know what the answer
4 is. You haven't got a -- I don't know what -- I
5 don't know the evidence in this case. If you're
6 asking me to say I'm going to exclude evidence that
7 was obtained by someone sticking a red hot poker in
8 someone's eye, well, the prosecution is going to
9 have the burden of presenting it. It doesn't sound
10 likely that I would let it in, but I'm not going to
11 promise because I don't know. I just don't know.

12
13 DC: I believe there is evidence of Mr. al Bahlul's
14 torture, and I believe that it through the
15 Preston-Carr e-mails would either -- it's either
16 present or it's been missing. So it's going to be
17 an issue that's going to come up. Would you agree
18 though that how evidence is obtained and through
19 what means, sources, and what may have happened to
20 that evidence or not happened to that evidence is
21 relevant at least in these proceedings, assuming
22 it's brought forth in an appropriate manner?

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Presiding Officer: Do I agree that the method by which we obtain evidence is something that you should consider before you determine whether the evidence is admitted or do I believe that it's something that should be considered when evaluating the evidence or both of those questions?

DC: Both.

Presiding Officer: Yes.

DC: Thank you, sir. I don't want to appear snide. There is a good faith basis for asking this next question and --

Presiding Officer: Okay.

DC: -- I believe it is relevant. Are you aware of a law which allows you to have an increase in retired pay based on your being recalled to active duty and staying on for a certain amount of time?

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Presiding Officer: No. However after, you may give me the cite.

DC: I'll check on it. I don't have the cite, sir. I just believe the law exists out there. I thought maybe I could trick you into saying it.

Presiding Officer: Okay.

DC: I do believe that there is a law that says that you get an increase in retired pay based on a certain -- based on your recall to active duty for a certain amount of time. I believe it to be two years. I haven't checked it myself. Just for your -- sir, for your knowledge.

Sir, I ask that you reconsider answering -- or you reconsider not answering -- I guess you would reconsider your refusal to answer questions regarding some of the relations between -- just some of your family members and their roles and

1 what they do or what they --

2
3 Presiding Officer: Okay. My mother and father are 85 and
4 84. My father has been retired since 1982 or maybe
5 '81 or '80. I forget exactly which. My mother
6 continued to prepare tax returns until sometime in
7 the mid to late 80's or maybe even the early 90's.
8 My big sister is a social work counselor. My
9 brother is a carpenter. My little sister is dead.

10
11 DC: Sir, you mentioned that your father is retired. He
12 is retired from what, sir? You didn't mention the
13 profession.

14
15 Presiding Officer: He retired from the State Department.

16
17 DC: Did -- sir, do you need a break?

18
19 Presiding Officer: No, I'm fine.

20
21 DC: What did your father do for the State Department,
22 sir?

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Presiding Officer: I don't know. He worked in the mid-East with the Sinai Support Mission, I believe was his last job. The Sinai Support Mission was his last job.

DC: Do you know whether he had any professional dealings with what has been labeled Islamic Extremism or anything to do with turmoil in the Middle East?

Presiding Officer: I -- he had to do -- I mean, the Sinai mission was set up to run the Sinai. And since that had to do with separating Israel and Egypt, that certainly is turmoil; but I don't believe that he had anything to do with anything else. But I don't know; and since I don't know, it couldn't affect me.

DC: Yes, sir. Do you believe there is anything that a reasonable person when examining what your father did with the State Department would cause them to

1 think that possibly you had feelings one way or
2 another towards the issues important in this case?
3

4 Presiding Officer: No.
5

6 DC: Thank you, sir. Did -- and I apologize about the
7 question, sir. Did your youngest sister die of
8 natural causes or was it something that's related
9 to --
10

11 Presiding Officer: She died of natural causes.
12

13 DC: Is there anything about your siblings that someone
14 looking from the outside would cause them to think
15 that possibly you should not be a Presiding Officer
16 in this case?
17

18 Presiding Officer: I don't understand how it could be and my
19 answer is no.
20

21 DC: Sir, you've had a note -- there's been a noticeable
22 change in demeanor. What has caused the change in

1 demeanor?

2
3 Presiding Officer: My sister died a week ago today.

4
5 DC: I'm sorry, Your Honor.

6
7 I would ask that we continue this hearing until a
8 time later next month after Your Honor has had time
9 to grieve properly.

10
11 Presiding Officer: Okay. The only reason I'm having
12 problems is because I let you go farther than I
13 should have. There is nothing that I know of with
14 my family that has any impact on what my rulings
15 will be. Continue on.

16
17 DC: Yes, sir. I bring that up simply because it's not
18 necessarily an issue of impact with your family on
19 what your rulings may be, it's your ability to
20 concentrate and not be distracted and focus and --

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22 Presiding Officer: I'm concentrated.

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DC: Yes, sir.

Presiding Officer: Go on.

DC: Yes, sir. I was just -- Question 24, Page 4: I asked, "Have you ever stated an opinion to anyone about the legality of the Commission process?" Your response was not --

Presiding Officer: I have not stated any opinion about the legality of the Commission process other than in a court setting or in a setting in which my conversation was privileged.

DC: If you speak with -- Question 23: I asked, Did you -- if you had spoken with anyone at the JAG School about the Law of War and Military Commissions, and you said essentially the instructors at the Law of War Course. Would you consider those conversations to be privileged, sir?

1 Presiding Officer: No.

2

3 DC: Is it safe to say, sir, the only privilege that you
4 have had -- believe you have would be to other
5 Presiding Officers and possibly the Assistant
6 Presiding Officer?

7

8 Presiding Officer: Yeah.

9

10 DC: Question 25: I essentially asked the same thing
11 but this was about the procedures to be used in the
12 Commissions.

13

14 Presiding Officer: Thank you. Go on.

15

16 DC: Sir?

17

18 Presiding Officer: No, I mean -- I don't. Yeah. I don't
19 know what you want me to say. Have I ever said
20 that the Commissions are illegal? To the best of
21 my knowledge, I've never said that. Have I ever
22 said the procedures are illegal? To the best of my

1 knowledge, I haven't said that.

2
3 DC: Do you report to anyone?

4
5 Presiding Officer: No.

6
7 DC: Question 46, sir, on Page 8, you responded to as
8 not being relevant. This dovetails into a couple
9 questions earlier.

10
11 Presiding Officer: It's the same thing.

12
13 DC: Right.

14
15 Presiding Officer: To the best of my knowledge and belief,
16 I've never -- you know, I don't know what I -- I
17 don't remember saying anything about them. So if
18 I -- but I -- so I don't know what the answer is.
19 Go on.

20
21 DC: Yes, sir. At the Military Judges Course in 2005,
22 you spoke.

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Presiding Officer: Yes.

DC: What was the topic, sir, or were you just a -- you
 were one of the keynote?

Presiding Officer: I was the opening speaker.

DC: Thank you, sir. I have all sorts of people that
 when they find out that I'm involved in the
 Military Commissions that want to talk to me and I
 talk to them. I would assume that, sir, you'd have
 the same sort of problem, but the same issue. Do
 people ask you questions about the Commissions and
 your involvement and what it's all about?

Presiding Officer: People who know enough to know what I'm
 doing, don't because they know I'm not going to
 talk about. I mean, you know, they say, "What are
 you doing?" I say, "I'm going to GTMO tomorrow or
 next week." People who don't know anything about
 it -- the level of interest among people who are

1 not in a narrowly focused class in the Military
2 Commissions is minimal in the United States. So I
3 don't think I've received very many questions other
4 than, "Hey, what are you doing?" "Okay. I'm going
5 down to Guantanamo." "Okay. What do you do?"
6 "Well, I'm a Presiding Officer." "Okay. Well, I'm
7 bored now." That's their answer.

8
9 DC: On Page 11, I asked two questions, 58 and 59. What
10 kind of cases you tried as a trial counsel and
11 defense counsel. Your answer was numerous. Is it
12 safe to say -- well, did any of those cases involve
13 anything that remotely like what's happening in
14 this proceeding today?

15
16 Presiding Officer: No, no. No, they didn't.

17
18 DC: I didn't think it did, but I thought I would ask.

19
20 Presiding Officer: I did. I'll change my answer to one of
21 the -- I mean, one of these questions you may have
22 asked. I was thinking, I did try a guy at the

1 82nd, who was an OPFOR for a SERE training. Do you
2 know what that means?

3
4 DC: No, sir. I know --

5
6 Presiding Officer: He was OPFOR. He was support force for
7 SERE training, which is Survival, Escape,
8 Resistance to Interrogation, and Evasion -- or I
9 may have gotten the letters wrong. And this OPFOR
10 guy was charged with abusing one of the SERE
11 trainees that he had caught.

12
13 DC: They were both Americans?

14
15 Presiding Officer: Yeah. But the SERE trainee was -- the
16 OPFOR guy was playing as if he were a hostile
17 force.

18
19 DC: Did you try the case, did you defend the case,
20 or --

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22 Presiding Officer: I was the judge.

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DC: Judge. Okay. Question 73, sir.

Presiding Officer: Okay. I've sought opinion, advice, and guidance from fellow Presiding Officers from the Assistant to the Presiding Officer, and, as I said, from the people at the JAG School when I was there.

DC: Did you ever sit down with anybody? I did. I sat down with a couple of folks and talked to them trying to learn this stuff because it's new to me. I sat down with Major Watts, is one of the persons I --

Presiding Officer: That's good because that's the same guy I sat down with.

DC: I guess we'll have the same answers. Is there anybody else that you sat down with in particular, sir?

Presiding Officer: Pardon?

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DC: I apologize. Was there anybody else that you remember sitting down with in particular?

Presiding Officer: No. Just Sean Watts.

DC: Question 74: Have you ever -- I understand your position on privilege regarding --

Presiding Officer: Okay. Except for matters involving the other Presiding Officers, there have been no --

DC: Or the [inaudible]?

Presiding Officer: -- conferences, meetings, or whatever.

Back in July of 2004, I tried to meet with all of the counsel, but that's all in the same thing. No. No one knows how to run a Military Commission, so I wouldn't go anywhere else for training.

DC: Have you ever met with anybody in the Appointing Authority's Office? I know that you're assigned to

1 the Office of the Military Commissions, and I'm
2 still trying to understand the exact structure of
3 this mess. But have you ever -- I'm going to
4 assume that being assigned to the Office of the
5 Military Commissions -- you don't have a boss.

6
7 Presiding Officer: Actually, I just learned today from Chief
8 [REDACTED] when I asked her a question, she said,
9 "You're not assigned to us. You're detailed to
10 us." But I will go with you on the assigned
11 because that's what I thought I was. But go on.

12
13 DC: Do you know where you're detailed from?

14
15 Presiding Officer: No.

16
17 DC: I thought I'd try. Have you ever sat down with
18 anyone or had e-mails with anyone in the Appointing
19 Authority's Office regarding procedures --
20 involving procedures and how these things should be
21 set up or run? I know there's some because I've
22 seen some from General Altenburg. I'm trying to

1 understand what the Appointing Authority and your
2 involvement has been in setting up the procedures.

3
4 Presiding Officer: Okay. I was appointed -- I guess Mr.

5 Hodges and I got to DC about the 14th or 15th of
6 July of 2004. We talked and discussed with each
7 other, and he sent some recommendations to the
8 office, the OMC. We then went to Guantanamo for
9 sessions in August of 2004, and I sent some
10 interlocutory questions up.

11
12 In 2005, when we had a Chief Clerk for military
13 Commissions appointed, he and -- Mr. Hodges and I
14 coordinated -- if you look at the POMs, you'll find
15 that several of them are joint with the Chief Clerk
16 for Military Commission. You'll find that if you
17 look at them. But I haven't asked Mr. Altenburg
18 for advice on any procedural matters for quite
19 awhile. The last advice I got from him was
20 Appointing Authority Regulation Number 2, which
21 came out last month I think.

1 DC: Are you involved in the drafting or not -- let me
2 take back the word "drafting." Are you involved in
3 the -- do you provide input to Mr. Altenburg
4 regarding things that end up in his Appointing
5 Authority regulations?
6

7 Presiding Officer: No. If they're sent out for comment I
8 would, but they're not sent out for comment I don't
9 think. I mean, I send my POMs out to counsel for
10 comment. I send them to wherever, and we get
11 comments. No, nope.
12

13 DC: I asked that question, sir, because I do have some
14 e-mails between -- on various topics where you're
15 in the e-mail along with Colonel Hodges or
16 Mr. Hodges -- I'm sorry -- General Altenburg, and
17 maybe Mr. Harvey regarding -- and maybe some other
18 person in the Appointing Authority's Office
19 regarding changes that may be coming up within
20 various regulations.
21

22 You would agree that's true?

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Presiding Officer: That what's true? I'm on e-mails with those people?

DC: Yes.

Presiding Officer: Sure. Yeah. I agree.

DC: Do you respond and provide input?

Presiding Officer: Okay. So you don't have to look through your things, to the best of my knowledge, I have never provided any input on anything except the matters that Mr. Harvey is a joint POM writer with me on.

DC: When we go into recess, I'm going to ask that something be marked and admitted now.

Presiding Officer: Give it to her right now. She'll mark it.

1 *The court reporter did as directed.*

2
3 Presiding Officer: Okay. RE-166 is an e-mail dated 23

4 August 2004, in which a member of the Appointing
5 Authority's Office advised me and General Hemingway
6 and Mr. Altenburg and Lieutenant Colonel [REDACTED] and
7 Mr. Hodges that they anticipated a change to MCI 8.
8 That's what it is. Yeah.

9
10 DC: May I show this to the prosecutor?

11
12 Presiding Officer: Sure. Yeah. Yeah.

13
14 *The counsel did as directed.*

15
16 Presiding Officer: For those of you who may be worrying,
17 we're going to stop at 1700 and recess until 1830
18 so the troops can get fed. Go on.

19
20 DC: Yes, sir. Mr. Altenburg is the Appointing
21 Authority?

1 Presiding Officer: Yes.

2
3 DC: Mr. Hemingway or General Hemingway is?

4
5 Presiding Officer: The Legal Advisor to the Appointing
6 Authority.

7
8 DC: There was a Captain on that e-mail that he sent it
9 out. Do you know who that person was?

10
11 Presiding Officer: Yeah. From what I remember, it was a guy
12 named Captain [REDACTED]

13
14 DC: He worked at the Appointing Authority's Office as
15 well, sir?

16
17 Presiding Officer: As far as I know, yeah.

18
19 DC: Sir, that's an example of an e-mail that I'm asking
20 questions about. Are there other e-mails like that
21 that have been either received by you or sent by
22 you to other folks in the Appointing Authority's

1 Office?

2
3 Presiding Officer: Okay. I'm sure there are. Are you
4 trying to ask if I have an input on what Mr.
5 Altenburg puts out? I don't -- where is this line
6 of questioning going? I'm just curious. I mean,
7 so you can tell me. I can answer.

8
9 DC: Part of what the President wants in a full and fair
10 trial is that you be an independent person.

11
12 Presiding Officer: Okay. I'm with you.

13
14 DC: And your -- it's not -- in a normal courtroom,
15 the -- Mr. Altenburg is acting as sort of like the
16 legislature in this process. He passes what
17 purport to be laws almost in a sense, and this is
18 an interesting process. But this is the equivalent
19 of the judge and the legislature getting together
20 and talking about what the law should be on a
21 particular case. I would believe that's improper.
22 It certainly wouldn't be independent, and it

1 wouldn't provide for a full and fair trial, and
2 that's what it appears to be at least. I've only
3 been here for three and a half months. So that's
4 what it appears to me, and that's my proffer, I
5 guess, why I believe it's relevant and where I'm
6 going, sir.

7
8 Presiding Officer: Okay. Go on.

9
10 DC: Are there other e-mails and things like that that
11 come up on other issues --

12
13 Presiding Officer: Okay. I'm not going to let you
14 characterize this as an e-mail on things like that.
15 This was an informational e-mail sent in which the
16 Office of the Military Commissions advised me as
17 the Presiding Officer that MCI 8, which is
18 published by the Office for the General Counsel,
19 was proposed to be changed. And the reason they
20 sent it to me was because the proposed change
21 specifically had to do with the duties of the
22 Presiding Officer. They weren't asking me would I

1 do it. They just sent me the proposed change. If
2 they had asked my opinion, I would have given my
3 opinion but no one did.

4
5 Are there e-mails where I have told Mr. Altenburg
6 what to do? No. Are there e-mails where
7 Mr. Altenburg has sent out and I have become copied
8 on them, proposed changes? Yes. Have I given
9 input to Mr. Altenburg? No.

10
11 DC: Has Mr. Hodges?

12
13 Presiding Officer: I'm sure he has in some. I have -- you
14 have a whole memorandum there that he sent back in
15 July of 2004 -- August of 2004.

16
17 DC: That who sent, sir?

18
19 Presiding Officer: Pardon? I can't hear you.

20
21 DC: I apologize, sir. That who sent, sir?

1 Presiding Officer: Mr. Hodges.

2

3 DC: You would agree with me though -- would you not --
4 that Mr. Hodges has been involved with the
5 Appointing Authority's Office in shaping -- I'm
6 not -- I use "shaping" in a -- I know you don't
7 like the word "shaping" -- in shaping the law of
8 Military Commissions?

9

10 Presiding Officer: No, I would not agree with it. I would
11 say that Mr. Hodges provided the Appointing
12 Authority's Office with what he believed to be what
13 should be done. Whether or not they took his
14 advice is a different matter. I think that perhaps
15 his most important action in shaping Commission law
16 was his actions in -- when we wrote the POMs. I --
17 to the best of my knowledge, he did not write
18 anything else but --

19

20 DC: The reason why I believe it's relevant, I believe
21 it may be a basis for a challenge for cause, sir,
22 is because you have had what you consider to be

1 privileged conversations with Mr. Hodges about how
2 a Commission -- well, I don't know what it's
3 about -- but I will assume it's about how the
4 Commissions are going to work in a general sense.
5 Mr. Hodges then had conversations with the
6 Appointing Authority, I believe, though e-mails or
7 actual conversations about how the Commissions are
8 going to work. And the Appointing Authority then
9 has either taken Mr. Hodges' suggestions, which I
10 think he probably would since he's down on the
11 ground, or not taken his suggestions and then sent
12 out directives on how the Commissions work. Mr.
13 Hodges would appear to a reasonable person, I would
14 argue, to be a conduit.

15
16 Presiding Officer: To be a what?

17
18 DC: A conduit. A way to relay information.

19
20 Presiding Officer: Okay.

21
22 DC: On the ground about how the Commissions are

1 working, the structure of them, conversations based
2 on -- ideas based on what you and other Presiding
3 Officers have had with Mr. Hodges and relayed that
4 information to the Appointing Authority. And then
5 the Appointing Authority does what he does and
6 issues regulations and directives that come back
7 down so that, it can be argued reasonably, that you
8 and -- through Mr. Hodges and through -- you
9 through Mr. Hodges is shaping -- it's shaping it up
10 and it's shaping it right back down the way the
11 Commissions or the process works here, sir. So
12 I'll move on, but that's my proffer I guess as to
13 why I think all of this is relevant.

14
15 Presiding Officer: Go on.

16
17 DC: Yes, sir.

18
19 Have you received -- Question 75: Have you
20 received training from someone -- have you received
21 training on this?
22

1 Presiding Officer: No. OJT.

2

3 DC: Question 76: Have you read -- have you read what
4 you believe to be relevant Commission cases in the
5 past, like Nuremberg, some of the history of
6 Nuremberg? I mean, have you read this stuff?

7

8 Presiding Officer: Yeah. Sure.

9

10 DC: Have you read the -- I'm going to lump cases and
11 commentary together.

12

13 Presiding Officer: Okay.

14

15 DC: Have you read -- do you believe you've read cases
16 and commentary involving -- that have mentioned the
17 World War II Commissions?

18

19 Presiding Officer: Yeah.

20

21 DC: The Civil War Commissions?

22

1 Presiding Officer: Yes.

2

3 DC: The Spanish American War Commissions?

4

5 Presiding Officer: I couldn't tell you on that. Go on.

6

7 DC: Is it safe to say what you've read what you would
8 believe to be the relevant historical case law and
9 commentaries involving Military Commissions or a
10 lot of it?

11

12 Presiding Officer: Yes.

13

14 DC: Is there a relationship that exists between you and
15 any other Presiding Officer that, if known
16 publicly, would cause a reasonable person to think
17 that these guys are in cohorts together or that
18 there is something improper there?

19

20 Presiding Officer: No.

21

22 DC: Yes, sir. May I have one minute please, sir?

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Presiding Officer: Yeah.

Counsel conferred.

DC: Two questions, sir.

Mr. al Bahlul took off his headphones and then put them back on. He is still boycotting these proceedings, but he is listening.

ACC: There is a difference between hearing and listening.

Presiding Officer: Okay.

DC: Does the judge have the authority to transfer Mr. al Bahlul next to KSM and Ramzi bin al-Shibh

Presiding Officer: Not that I know of.

DC: Sir, I have no more questions at this time.

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Presiding Officer: Okay. We'll take a recess until, what,
did I say 1830?

PROS: Yes, sir.

Presiding Officer: 1830. And, trial, you can -- if you have
any voir dire based on this, you may bring it up
then. Anything you need to say before we recess?

PROS: No, sir.

Presiding Officer: Apparently not. The court's in recess.

The Commissions hearing recessed at 1652, 1 March 2006.

1 *The Commissions hearing was called to order at 1835, 1 March*
2 *2006.*

3
4 Presiding Officer: The court will come to order.

5
6 PROS: All parties who were present at the close of the
7 proceedings are again present with the exception of
8 the Accused. We also have a new court reporter,
9 [REDACTED] who has previously
10 been sworn.

11
12 Presiding Officer: Thank you.

13
14 Major Fleener, obviously, Mr. al Bahlul is not
15 here.

16
17 Did you discuss his presence with him before he
18 decided to absent himself?

19
20 DC: I did, Your Honor.

21
22 Presiding Officer: You heard me on the record?

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DC: Yes, sir.

Presiding Officer: Did you explain this to him also?

DC: Yes, sir.

Presiding Officer: Is his absence voluntary?

DC: Yes, sir.

Presiding Officer: He chose to do it?

DC: Yes, sir. He -- he -- he chose to do it. He believes that he's been oppressed from the beginning, not being allowed to freely choose his own lawyer, that you have stood with the prosecution or the government, and will not follow the law, which says he should be able to be his own lawyer, as written in international law and domestic law.

1 This is his right to either be his own lawyer or to
2 have a Yemeni lawyer and that his absence now is
3 another form of boycott, but it is a voluntary
4 boycott.

5
6 Presiding Officer: Okay, thank you, Major Fleener. I
7 appreciate that.

8
9 DC: Yes, sir.

10
11 Presiding Officer: I may have said on the record incorrectly
12 last time, that the e-mail that Major Fleener had
13 marked -- is marked as RE-158. It was not, it was
14 marked as RE-166.

15
16 During the recess -- and everyone can read articles
17 and cases differently -- I had occasion to review
18 the Army Court of Criminal Appeals decision in
19 *Kreutzer*, which is found at 59 M.J. 773. As I
20 recall, it focused on two things, the denial of the
21 mitigation expert and ineffective assistance of
22 counsel.

1
2 The comments about being rushed were found in
3 affidavits attached. They weren't to my knowledge
4 found anywhere else, but as I said, everyone can
5 read cases differently.
6

7 Presiding Officer: So there is no question in the future,
8 trial, Major Fleener, I do not see a requirement
9 for me to drag Mr. al Bahlul into court. I further
10 do not see any requirement for me to order him
11 dragged to the courtroom. I would like you-all to
12 consider that and be prepared to offer me your kind
13 thoughts on the matter tomorrow morning.
14

15 In other words, if Mr. al Bahlul when he is woken
16 up to come here tomorrow says he doesn't want to
17 come, I do not intend to order him brought to the
18 courtroom. If either side believes I'm incorrect,
19 I'll be glad to listen to what you say. I am not
20 hard over on this yet, but that to me appears to be
21 the correct solution. And I'm not asking for a
22 quick answer right now. If you want to say

1 anything, you may.

2
3 DC: I do. Sir, I would recommend that he be brought to
4 the courthouse and be allowed to freely choose
5 whether to come to the proceeding. Because if he
6 decides he wants to be here halfway through the
7 proceeding, which I think he has that right and the
8 proceeding should stop and allow him to be here if
9 he wants to be here, we would have to stop
10 everything. There would be no way to get the
11 information here. I would also believe that -- I
12 believe he should be here. I believe it's in
13 everyone's best interest -- his best interest to be
14 here. And --

15
16 Presiding Officer: Excuse me. The "here" you mean in the
17 courtroom?

18
19 DC: Here in the building --

20
21 Presiding Officer: Okay.

1 DC: I believe it's in his best interest to be in that
2 chair, sir.

3

4 Presiding Officer: I agree, but --

5

6 DC: But if -- and he's more likely to be in that chair
7 if he is in the courtroom.

8

9 Presiding Officer: Courthouse.

10

11 DC: Courthouse. And he has -- I think he has -- if
12 you'd like to exercise autonomy and choose not to
13 participate by coming into the courtroom, that
14 should be his choice; but by not having him in the
15 courthouse, it makes it so that he has no choice.
16 If he were to change his mind, he cannot. So I
17 would ask that he be brought to the courthouse.

18

19 Presiding Officer: I -- I happen to agree with your
20 philosophical underpinnings. My question is: What
21 if he resists being brought to the courthouse? I'm
22 being serious here, Major Fleener. I have no great

1 desire -- I have no great desire to drag someone
2 from the camp to here in shackles and chains
3 against his will, you know, four people, one on
4 each extremity or whatever. I don't know that
5 that's going to happen, but I would ask you to at
6 least think about that.

7
8 DC: I don't think it will happen, but I haven't -- it
9 hasn't happened yet. When -- when does -- when do
10 you need an answer from me, sir, or at least a
11 recommendation from me?

12
13 Presiding Officer: Neither you nor I, Major Fleener, is able
14 to predict what's going to happen. You may get me
15 calling you tomorrow morning with a request for a
16 quick opinion.

17
18 DC: That's fine, sir. I'd like tonight to think about
19 it.

20
21 Presiding Officer: Trial, you feel like saying anything
22 right now?

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PROS: No, sir. Our only concern would be making sure that there's something on the record showing that it's voluntariness on his part, and I'm not sure how you do that without some sort of written waiver or assurances from the defense counsel. But in light of the bad relationship between the defense counsel and his client, you know, if he claims later that he wanted to be here and -- which is not what he told the defense counsel, where does that leave us? So my concern is how do you get it on the record what his wishes are accurately without him being here.

Presiding Officer: Do you mean right now?

PROS: No, not right now. But I'm thinking down the road, sir. That's my concern is how -- you know, how do we get it communicated on the record. Again, I -- you know, I'll take until tomorrow morning to get our thoughts together in a more cogent fashion as I'm thinking off of the top of my head right now.

1 But that would be our biggest concern is making
2 sure that it is, in fact, a voluntary choice, and
3 he understands the ramifications each and every
4 time that he makes that choice.

5
6 Presiding Officer: With luck, we won't have to deal with it
7 tomorrow morning, but we'll see.

8
9 PROS: Yes, sir.

10
11 Presiding Officer: Okay. Trial, do you have any voir dire
12 based on what the defense had?

13
14 A.PROS2: No, sir, we do not. And based on the two
15 sessions, Review Exhibit 138, the written responses
16 that you gave in Review Exhibit 156, the previous
17 transcripts that were part of 138, and those that
18 are public, what's been basically a very thorough
19 voir dire, we also have no challenges as well based
20 in light of everything that's occurred -- that's
21 happened. So we do reserve the right to respond if
22 any are made, but we have no challenges, sir.

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Presiding Officer: Defense?

DC: Sir, there were two -- two things that I didn't address during voir dire of you. I'd like to bring them up now.

Has your father expressed any strong feelings about -- about al Qaida to you?

Presiding Officer: My father has strong feelings about everything, including me, including the length of his grandchildren's hair, and he's expressed strong feelings about everything.

If what you're asking is, have we had a discussion about al Qaida? No. If you are asking me if he told me that he abhorred the attacks of 911? Yes. But he is not, to my knowledge, an expert on al Qaida or an expert on anything like that. But, yeah, he has -- he has strong -- he's got -- he's got -- he's got really, really strong feelings

1 about lawyers too.

2
3 DC: Yes, sir. Did you grow up in the Middle East, sir,
4 at all?

5
6 Presiding Officer: No, I didn't. I grew up in Virginia and
7 France basically.

8
9 DC: How much time did your father spend in the Middle
10 East?

11
12 Presiding Officer: He came home from Vietnam in 1975. I
13 believe he went to the Sinai Support Mission
14 sometime in '76, and I believe he may have spent
15 maybe three weeks, a year, for three years there in
16 the Sinai. But I -- I would not only -- I wouldn't
17 bet on that, but that sounds what -- that sounds,
18 you know, about right. I was doing other things at
19 that time.

20
21 DC: Yes, sir. Was his work classified?

1 Presiding Officer: I don't know. I didn't ask him. I
2 think what he was doing was the Sinai Accords were
3 made under the auspices of Mr. Carter and a buffer
4 zone was established in the Sinai between Egypt and
5 Israel. The United States agreed to set up, run,
6 handle, some word like that, this buffer zone for a
7 period of time.

8
9 He was in the Sinai, I imagine, running log --
10 logistic matters. I don't know; I didn't ask him;
11 it didn't sound like -- I mean, everyone knew he
12 was there or they were there. People were there,
13 so it didn't sound classified to me. But I didn't
14 ask and I don't know.

15
16 DC: Was your father a mid-level staffer in the State
17 Department or was he a high-ranking diplomat in the
18 State Department?

19
20 Presiding Officer: I regret to say that, no, he was not a
21 high ranking diplomat in the State Department.
22 Among other things, he holds strong opinions on our

1 diplomats.

2
3 DC: I understand, sir.

4
5 You were handed some notes during voir dire by the
6 Sergeant at Arms. How many notes were you handed,
7 sir?

8
9 Presiding Officer: Got no idea.

10
11 DC: What did the notes say, sir?

12
13 Presiding Officer: Well, one of them said, "When are you
14 going to break for dinner?" And, no. One of the
15 notes said, one -- it was from me to them from --
16 to the bailiff to dig out, "When is dinner for the
17 troops going to be ready?" And a note came back
18 and said -- it gave me two options, so I chose the
19 option.

20
21 Another note -- it wasn't a note -- it was the
22 C.A.A.F. opinion in *Kreutzer* -- the Court of

1 Appeals for the Armed Forces opinion in *Kreutzer*,
2 which wasn't what we were discussing. And I don't
3 remember any other notes.
4

5 DC: Was there any note that addressed something that we
6 talked about in voir dire for instance, or how
7 to -- method, how to conduct voir, or something
8 like that?
9

10 Presiding Officer: No. The -- I think I -- I believe I sent
11 a note out to get me the C.A.A.F. opinion that you
12 had -- to get me the A.C.C.A. opinion that you had
13 referenced.
14

15 DC: Yes, sir.
16

17 Presiding Officer: So, yeah, that was something that we
18 talked about in voir dire, and they sent me the
19 C.A.A.F. opinion instead.
20

21 But I've got the A.C.C.A. opinion now if you want
22 to see it.

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DC: I have the A.C.C.A. opinion. I don't have the C.A.A.F. opinion. But those are the only questions I have.

I would, with your permission, sir, request to brief, in detail, the grounds for the challenge for cause. After I get the transcripts and have a chance to review the transcripts in light of all the information that's out there, including the various transcripts from other cases, I would ask that I be allowed to brief it in detail regarding my specific challenges for cause.

May I have the opportunity to do that, sir?

Presiding Officer: Okay. Major Fleener, you may brief anything you want. However, we've got other business that we're going to take care of, and I'm not going to wait for you to prepare a brief. You may state your grounds for challenge for cause and if you want to supplement them --

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DC: That's fine, sir.

Presiding Officer: -- later, then I will let you do that.

But, you know, the purpose of voir dire is for me
to decide whether I can go on with what I've got
now.

DC: Yes, sir.

Presiding Officer: So if you have a challenge for cause, if
you'll state it succinctly, and then we can move on
from there.

DC: Yes, sir. And I will request to supplement this
after the transcripts come, and I do understand
the -- your need to continue on.

I would challenge you for several grounds, sir.

I don't believe that you are independent, neutral,
or detached. I believe all three of those are

1 implicit in the President's full and fair trial.

2 They are mentioned in Mr. Altenburg's 2004 decision
3 regarding what challenges for cause are.

4
5 Presiding Officer: I apologize.

6
7 DC: Yes, sir.

8
9 Presiding Officer: The court will be in recess for 10
10 minutes. Mr. al Bahlul says he wants to see you
11 and perhaps he will join us after he sees you.

12
13 DC: Yes, sir.

14
15 Presiding Officer: The court's in recess.

16
17 *The Commissions hearing recessed at 1852, 1 March 2006.*

18
19 *The Commissions hearing was called to order at 1906, 1 March*
20 *2006.*

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22 Presiding Officer: The court will come to order.

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PROS: All parties who were present when we recessed are again present. The Accused is still absent.

Presiding Officer: So there's -- so there's no question, I allowed the interruption to the proceedings because I thought it was important; however, that will not interrupt the proceedings again like that.

Okay. Major Fleener, you were on number one, not independent neutral. Go on.

DC: You're not independent, neutral, or detached. Your relationship with the Appointing Authority is such that there is -- your office, wherever your office may be and his office, which appears to be in DC, with e-mails going back and forth between each other, I believe it -- I believe you, through Mr. Hodges, through the Appointing Authority have shaped this entire system so that the Appointing Authority is serving as sort of a legislature, sort of a judge. I believe you're serving as sort of a

1 legislature, sort of a judge.

2
3 I'm reading from the Appointing Authority's
4 decision on challenge for cause for 2004: "The
5 exceptional difficulty and pressure with being the
6 first Presiding Officer to serve on a Military
7 Commission in over 60 years cannot be overstated."

8
9 Hey, I would agree with that. And with all due
10 respect, sir, I don't believe that you are the
11 person who should be the first Presiding Officer to
12 sit in a Military Commission in 60 years. I
13 believe that Mr. Altenburg chose you because of
14 your close relationship to him. He chose you
15 because you're his friend. And he chose you when
16 there are other people he could have chosen.

17
18 I don't believe that you are qualified. While you
19 may be qualified to serve to be a judge advocate, I
20 don't believe you are qualified in the sense that
21 you should be the Presiding Officer in a Military
22 Commission.

1
2 You're not an active member of the Virginia Bar. I
3 believe it is important.
4

5 Presiding Officer: Excuse me. Are you -- is this a
6 different grounds for challenge or is this part of
7 the same grounds number one?
8

9 DC: It is an additional challenge.
10

11 Presiding Officer: Okay.
12

13 DC: They're all wrapped -- I mean, there's very little
14 law on what the authority is for you to sit or not
15 sit as a Presiding Officer, sir.
16

17 I don't believe that you're independent or
18 detached. I believe the relationship is too close.
19 I don't -- and I believe that you've helped shape
20 the very system that you're now judging -- serving
21 as a judge in. I don't believe that's proper.
22

1 Regarding your qualifications, I don't believe
2 you're qualified to serve. While not an active
3 member of the Virginia Bar -- while not being an
4 active member of the Virginia Bar or an active
5 member of any bar is not apparently a per se
6 disqualification from serving as a judge advocate,
7 it should be taken into account when deciding
8 whether you should be the first Presiding Officer
9 to serve in a Military Commission in over 60 years.

10
11 The difference between being an active member of
12 the Virginia Bar and an associate member of the
13 Virginia Bar is one not simply of funds, which is
14 a -- it's a little more expensive to be an active
15 member.

16
17 You've had no CLE requirements since 1997, I
18 believe, when you were a judge advocate. I believe
19 the first Presiding Officer of a Military
20 Commission in 60 years under the President's full
21 and fair trial authorization should have had CLE.

1 I believe it's arguable that you committed the
2 unauthorized practice of law in Virginia. I'm not
3 an ethics scholar. I've read the opinion. I have
4 spent much time trying to determine whether the
5 difference between serving as a judge advocate,
6 what are the -- we use the language "qualified and
7 certified under Article 27(a), sworn under Article
8 26(b)," but there's very little guidance in what it
9 is to be qualified and certified; and I have been
10 unable to find very little guidance on what TJAG
11 uses to certify and qualify judge advocates.

12
13 I note in the Appointing Authority's decision --
14 again regarding the challenges for cause -- that
15 that issue was addressed, and the Presiding
16 Officer, with all due respect, Mr. Altenburg, just
17 kind of punted. He punted to TJAG and said, Well,
18 TJAG certifies people, and you were certified, we
19 believe, therefore talk to TJAG.

20
21 I don't know whether you were certified -- I assume
22 you were -- but I don't believe that you are

1 qualified in the sense that you should serve as a
2 Presiding Officer in this case.

3
4 The fact that you haven't practiced law since
5 1999 -- well, actually you were a military judge,
6 and I understand the difference between practicing
7 law and serving as a military judge.

8
9 The fact that you haven't served in a legal
10 capacity since 1989 is troubling at best, and it --
11 the Presiding Officer should be someone who has a
12 greater current legal understanding with all due
13 respect, sir, than yourself.

14
15 The fact that you haven't had any ethics training,
16 other than possibly a block at the Law of War
17 Course in 2005, is troubling as well.

18
19 One of the first issues that we've just spent an
20 enormous amount of time on is whether or not Mr. al
21 Bahlul's right to self-representation and then
22 along with that, what are the rights of the

1 attorney who is forced to represent the man. I
2 think that you should -- the Presiding Officer over
3 these Commissions is going to be facing many, many,
4 many legal challenges like that, especially in this
5 particular case with now a defendant who is not
6 present. And I don't believe that you have -- that
7 you are the person for the job in that sense as
8 well.

9
10 There are more. I have been jotting down notes as
11 I go. You've given me authorization to supplement
12 my objections when I get the transcripts, and I
13 plan to do so. But we -- we do challenge you for
14 cause under several grounds.

15
16 You're not independent, neutral, detached; that
17 you're not qualified; that you're -- that your
18 actions have indicated bias because you have found
19 consistent with the Appointing Authority in every
20 single situation. And you said today that you
21 didn't have to do that if you didn't want to, which
22 I would say that would be a grounds for saying that

1 you have acted in a -- a biased or not a neutral
2 manner in this case. And that's all I have, sir.

3
4 But I do move that you excuse yourself and that a
5 new Presiding Officer be appointed, sir.

6
7 Presiding Officer: You made a statement. You say that
8 you've found I've acted consistently with the
9 Appointing Authority's directions in every
10 situation. I don't understand what you mean by
11 that.

12
13 DC: These proceedings started under a different MCO.
14 For example, it was an MCO where all the members
15 had to be here, we thought. And you had all the
16 members come here for these things, and then the
17 Appointing Authority apparently changed his mind
18 about whether -- in fact, the Appointing Authority
19 said all the members had to be here, and then now
20 all the members aren't here anymore.

21
22 We haven't heard the motion yet. I expect the

1 motion is going to be denied, that the
2 inconsistencies between the PMO and MCO aren't
3 really there, and it's essentially because the
4 Appointing Authority has wanted to now make you
5 look more like a judge rather than a member of the
6 Military Commission. That's one example, sir.

7
8 The example that you -- there is no doubt that --
9 and I think, Your Honor, would -- would agree with
10 me, that every single basis of law, domestic or
11 international, looking at the Military Commissions
12 have allowed the right of self-representation,
13 every single one of them have, except
14 Mr. Altenburg's memo; and that's -- that's -- it's
15 true.

16
17 And, Your Honor, has chosen to go along with
18 Mr. Altenburg's memo rather than allowing a person
19 who is absolutely competent to serve as his own
20 counsel here allowed him to do so. And I believe
21 that that is -- that is part of going along with
22 the Appointing Authority. That's another example.

1
2 Have I -- I could probably think of more, but it
3 all goes -- it's all tied together, sir, that you,
4 through Mr. Hodges and the Appointing Authority,
5 make up all of the rules, and you can't do that.
6

7 Now, it -- it -- maybe you -- maybe a person --
8 maybe you could serve as the Chief Presiding
9 Officer still of the Military Commissions and be in
10 charge of making up the rules and offering -- we
11 debated this over dinner today -- and whether you
12 could serve as the Chief Presiding Officer and be
13 involved sort of an arm of the Appointing Authority
14 in helping put together the rules possibly. But to
15 actually sit as the Presiding Officer on one of
16 these cases is not proper, and it wouldn't look
17 proper from the outside. And, respectfully, sir,
18 it's not -- we don't believe it's proper for you to
19 sit today.
20

21 Presiding Officer: Anything else?
22

1 DC: No, sir.

2

3 Presiding Officer: Trial?

4

5 A.PROS2: Yes, sir. I'd first like to -- I'm not sure --
6 there we go.

7

8 Okay. First, sir, with regards to the challenges,
9 we believe that they should be denied.

10

11 And there is -- as we've said on now two occasions
12 that there's no reason for challenge that should
13 exist with regards to you serving as the Presiding
14 Officer. You show nothing but with -- first, with
15 regards to the Accused, nothing but patience and
16 gone above and beyond to protect the rights of the
17 Accused initially through the first session in
18 August of 2004, and then twice within the last two
19 months.

20

21 Now, dealing first, I want to -- I want to first
22 start with the standard for challenge of cause

1 because I think once we deal with the standard
2 under MCI Number 8, which cites us to the
3 Appointing Authority's standard, which is on --
4 which is RE exhibit 153, which is 10 of 28 --
5 actually it goes through the Appointing Authority's
6 language based on the challenge which is where MCI
7 8 comes from, and Military Commission Order Number
8 1, talks very specifically about the qualifications
9 for a Presiding Officer.

10
11 Judge advocate, prior judge or current judge, I
12 mean, qualified, which you meet those standards.
13 With regards to not a member of the Virginia Bar,
14 it really is irrelevant with regards to the
15 standards in meeting the requirements under --
16 under Commission law, and -- because you meet the
17 requirements to be an active practicing judge
18 advocate.

19
20 You know, Major Fleener's discussions about whether
21 or not you have or haven't had CLE credit quite
22 frankly are irrelevant. And he, himself, admits

1 that it's not a per se standard. It's not a per se
2 requirement to have you disqualified. And with
3 regard -- and he cites the second thing is the
4 ethics opinions, that you have to deal with ethics
5 opinions. Well, we have dealt it with twice.
6 We've dealt with it professionally, competently,
7 and there is no issues with regards to that
8 anymore. So there is a lot of smoke here, but no
9 substance with regards to not qualified as a
10 Presiding Officer.

11
12 I'd like to take the next, the not independent,
13 neutral, and detached, and his argument was kind of
14 bifurcated where he said, you shape the system and
15 that that's not proper and that indicates bias,
16 kind of all together because it really deals with
17 the whole independent judiciary concept that Major
18 Fleener brings to the table.

19
20 He cites your relationship with the Appointing
21 Authority. Now, our standards can be actual or a
22 limited implied bias. Nothing that was brought up

1 today wasn't previously dealt with. And, first,
2 let's start with the relationship with the
3 Appointing Authority.

4
5 The Appointing Authority's memo, specifically if
6 you look at *U.S. versus Howard*, which is cited in
7 that memo, and *United States versus Bray* as well as
8 *Antenello versus Wunsch*, they're all cited in it.
9 The language is there within the Appointing
10 Authority memo, and nothing is new here. This is
11 not new ground. And your challenge -- and the
12 challenge under those grounds because of your
13 relationship should be denied.

14
15 Now, he also cites that there has been e-mails back
16 and forth. The only thing that really came out
17 with regards to voir dire, sir, was one e-mail that
18 has since been labeled as Review Exhibit 166 of
19 which the classification of that e-mail is sent
20 from the Appointing Authority's office to you as
21 the now Chief Presiding Officer stating that MCI
22 Number 1 -- or, I'm sorry -- MCI Number 8 was

1 coming out. There's no input from yourself.
2 There's no input directly on that from Mr. Hodges.
3 There's no evidence of any of collusion or, as he
4 said, you know, the shaping of the system. You
5 know, that's is a figment of Major Fleener's
6 argument. It's not reality, and it's not reality
7 based.

8
9 Again, look at the challenges under MCI Number 8.
10 You look at both the actual standard, actual bias
11 or actual and/or a limited implied, and there
12 really hasn't been anything brought up in today's
13 session nearly -- and which was, quite frankly,
14 quite extensive and quite thorough, probably more
15 thorough than necessarily needed to be with regards
16 to questions of yourself. There is nothing new.
17 There is no implied bias; there is no actual bias.

18
19 And we would certainly like to respond to any
20 motion or draft or supplemental that the defense
21 files, sir. But, quite frankly, everything that's
22 raised here has been previously raised and was

1 detailed and should be denied. There is absolutely
2 no reason why you can't sit as a Presiding Officer.
3

4 Nothing further, sir.
5

6 Presiding Officer: Defense?
7

8 DC: Respectfully, sir, under the -- the phrase "under
9 Commission law," there is no Commission law. It's
10 being developed as we go. And because it's being
11 developed as we go, all the parties that are
12 developing the Commission law, which would be, sir,
13 you, and the Appointing Authority, there is a
14 heightened scrutiny on your independence and your
15 ability to make your own judgments as this law
16 develops.
17

18 The way it's set up right now -- and make no
19 mistake about it because this is true -- you have
20 the Secretary of Defense and his writing the MCO,
21 the Military Commission Order. You have his lawyer
22 writing these instructions. Then you have Mr.

1 Altenburg who was hand selected by the Secretary of
2 Defense writing regulations, and then you have you
3 who was hand selected by Mr. Altenburg writing
4 memorandums -- memoranda, and there -- it doesn't
5 appear to be anybody else in this system.

6
7 I asked you who -- you were chosen by Mr.
8 Altenburg. I asked you who you worked for, and you
9 weren't able to give me an answer other than you're
10 assigned to the Office of Commission or at least
11 detailed to the Office of Commissions. But make no
12 mistake about it, you are shaping the system. And
13 he makes -- I appreciate Commander [REDACTED]
14 argument; but, yes, this is the argument of the
15 defense counsel, but it happens to be true.

16
17 And there's -- you're shaping the system. Everyone
18 knows you're shaping the system along with the
19 Appointing Authority because these MCO -- for
20 instance, MCO Number 1, when Mr. al Bahlul is
21 sitting in that chair with all the members here in
22 August of 2004, the reason he was sitting there

1 like that is because MCO Number 1 said, all the
2 members must be here.

3
4 Now, they write -- and you said on the record it's
5 because the President says that you -- you were the
6 triers of law and fact. Apparently, that's not the
7 case anymore because there is no one else here. So
8 now Mr. al Bahlul, we ask why he wants to know --
9 he's sitting in the chair. He asked me, "Where is
10 everybody else?" They changed their mind.

11
12 You -- this system is going to develop eventually,
13 and it will -- you know, Colonel Davis made a
14 comment the other day about trying to get the
15 defense attorneys of these cases into the courtroom
16 is like something with vampires and light. I
17 wasn't there. I just heard about it and giggled.
18 We want to go to court in a system that exists, not
19 this.

20
21 This, where we have POMs and we have regulations
22 and Commission orders and instructions that are

1 essentially all done by the -- not just the
2 Executive Branch and not just the Department of
3 Defense of the Executive Branch, but the Office of
4 the General Counsel from the Department of Defense
5 of the Executive Branch. It is the same people
6 writing the law, deciding how it should be applied,
7 executing the law, and then ultimately taking it up
8 on appeal. Now, that's going to be examined, I
9 believe, by the Supreme Court. But the problem is
10 that you, sir, are -- unlike Captain O'Toole and
11 Colonel Chester and some of the other Presiding
12 Officers in this case, I think -- I don't have
13 those folks involved in my case -- you're friends
14 with the guy. He asked you to come on board
15 because you're his friend, I assert.

16
17 And the -- you have been, for two years, brought
18 back from retirement -- I assert again -- helping
19 to shape the system. Whether you should serve in
20 an administrative capacity to help shape the
21 system, there is a lot of -- this is going to sound
22 mean -- there are a lot of retired Colonels up in

1 the Appointing Authority's office, and they've all
2 been involved in shaping this system, all of them
3 friends of Mr. Altenburg's.

4
5 But when you're sitting as the judge -- and he's
6 trying to make it look more like a courtroom now.
7 If you're going to sit as the judge, no convening
8 authority would tell the judge how to make these
9 decisions in a courtroom -- in a court-martial. He
10 asserts -- Mr. Altenburg ties himself, when
11 necessary and convenient, as a convening authority;
12 and he makes you a military judge when necessary
13 and convenient, except when it is not necessary and
14 convenient; and then you're a Presiding Officer who
15 is outside of this system. And he's not a
16 convening authority; he's an Appointing Authority.

17
18 But the bottom line is, if you would analogize this
19 to a court-martial, it's unlawful command influence
20 and no doubt about it. UCI still applies. That's
21 the one -- one of the provisions of the code that
22 says applies to Military Commissions.

1
2 Now, I'm not accusing anybody of unlawful command
3 influence because I've been here three and a half
4 months. I'm still trying to figure out what the
5 acronyms mean. But if Mr. Altenburg is telling
6 you -- is writing instructions telling you that,
7 no, we're not going to change the rules, you
8 can't -- he has to be -- he has to -- he has to
9 have a military lawyer, he can't represent himself.
10 And in spite of every single legal authority to the
11 contrary which says he gets the right to
12 self-representation, can get his own lawyer --
13 again in Nuremberg they had Germans. The Japanese,
14 they all had Japanese people come in. Yes, there
15 is a difference between domestic -- or
16 international tribunals and domestic tribunals, but
17 every single one of them has said you can be your
18 own voice, be your own lawyer -- but General
19 Altenburg -- General Altenburg and Mr. Altenburg
20 says, no, and you have agreed and cited General
21 Altenburg's regulation or General Altenburg's order
22 or regulation. And these are the same orders and

1 regulations that Mr. Hodges, I believe, is
2 providing input on to shape and change.

3
4 So, respectfully, you should not be a Presiding
5 Officer in this particular case. Whether you could
6 be a Presiding Officer in other cases is up to
7 those attorneys and Mr. Altenburg on other
8 decisions. But you should not be the Presiding
9 Officer in this case. I stand by my objections.
10 I'll supplement when the transcriptions come. And
11 they cite the standards for challenge of cause of a
12 Presiding Officer. Where did that come from? Mr.
13 Altenburg.

14
15 In *Hamdan* and *Hicks*, sir, they asked you to be
16 excused. Ask Mr. Altenburg, excuse your friend
17 Mr -- or Colonel Brownback. No. And there was a
18 big debate over what the standard is because no one
19 knew whether it's actual bias or an implied bias.
20 So everybody briefs Mr. Altenburg on the standard
21 that he should apply to kicking you off the case,
22 and Mr. Altenburg comes back and says, I choose

1 this standard. And now they cite that as the law,
2 but he's the guy that they asked -- it's his
3 relationship we're trying to fight in the first
4 place.

5
6 It is a system that has not worked and maybe it can
7 work in the future; but with all due respect, sir,
8 it can't work with you as the Presiding Officer of
9 this Military Commission. And I would respectfully
10 ask that you recuse yourself or submit to Mr.
11 Altenburg -- because I know that you can't make the
12 decision yourself on this, I don't believe --
13 submit to Mr. Altenburg that you should be excused.
14 It -- whether it's an actual bias or implied bias
15 or what Mr. Altenburg developed a year and a half
16 ago, some sort of mixed standard, we've met it.

17
18 A.PROS2: Sir, if I may, one brief point.

19
20 Major Fleener spent that last several minutes
21 talking about how Mr. Altenburg made the standard
22 and the whole soliloquy -- no need to report it

1 here -- but as Major Fleener was notified about the
2 standard that he had the opportunity to, no later
3 than February 21st, 2006, to challenge the standard
4 as MCI Number 8 says, my motion, and to challenge
5 this standard as was put forward to it and the one
6 that we would use, and it's silence from the
7 defense.

8
9 We're not doing -- this standard isn't because Mr.
10 Altenburg said so, it's because the defense chose
11 not to file a motion or to offer information or
12 prove or send up an alternate standard based on the
13 new change to MCI Number 1 which was solicited from
14 the Presiding Officer's office.

15
16 Presiding Officer: Which I -- in other words, which was
17 solicited by the -- on behalf of me.

18
19 A.PROS2: Yes, sir.

20
21 Presiding Officer: Thank you.

1 A.PROS2: So, I mean, the standard -- you know, the standard
2 that he's talking about was written, provided to
3 him, given the opportunity to object to, file a
4 motion, suggest an alternate standard where he
5 could have chose to use R.C.M. 902. He could have
6 chose to use the federal court standard, which I --
7 which he chose not to do, and that standard is
8 under 28 U.S.C. 455.

9
10 Now, if you -- if he was to look at both of those
11 standards in comparison with the standard that is
12 set out from Mr. Altenburg, you'll notice that
13 those standards, quite frankly, are pretty similar.
14 I mean, you could argue, you know, the devil is in
15 the detail. But he had the opportunity to do that,
16 sir, and didn't. So to come back and then say that
17 this is a part of a grand conspiracy, just really
18 isn't true; and that -- and that is one part of why
19 his reasoning and why his logic in regards to --
20 remember we're only talking about a challenge for
21 cause for you as a Presiding Officer -- really
22 falls -- really falls flat, sir.

1
2 I mean, you gave everybody the opportunity and what
3 you got was silence from the prosecution -- because
4 that's the standard we think we can use -- and you
5 got silence from the defense. So that's the
6 standard we use, sir. It should not be used
7 against -- with regard to at all with regards to
8 any sort of challenge for cause on voir dire.
9

10 Nothing further, sir.
11

12 DC: It's already been challenged, and this is what the
13 result was, was the Appointing Authority's
14 decision.
15

16 Now, a new order came out by the Appointing
17 Authority's person who selected the Appointing
18 Authority. This stuff, when it's challenged, it --
19 nothing happens because there have been no cases
20 that have gone forward.
21

22 Had -- I suppose I could have filed a motion to

1 challenge the -- to change the Appointing
2 Authority's challenge for cause. The Appointing
3 Authority didn't recognize that al Bahlul has a
4 right to self- representation, and they agreed he
5 did.

6
7 You -- this doesn't work, and that is actually true
8 as well. This -- this doesn't work. He cites
9 federal court; I wanted to jump through the chair.
10 I didn't -- or jump off my chair.

11
12 This is the equivalent of you being a federal judge
13 asking the legislature what to do about whether a
14 particular law should have a particular meaning or
15 not; and even the legislature, going back and forth
16 and certifying questions up to Congress and saying,
17 Hey, I'm going to do this, only in issues that are
18 favorable to him do I have to certify questions up
19 to you Congress.

20
21 Tell me is that -- whether a charge that's
22 dispositive toward the defense is okay,

1 Mr. Legislature, who's writing the law, Mr.
2 Altenburg.

3
4 Presiding Officer: Okay. I understand what you're saying,
5 but that has nothing to do with me. That was what
6 is written and none of those issues have been --

7
8 DC: I agree.

9
10 Presiding Officer: -- submitted.

11
12 DC: I agree. That does not have anything with you
13 personally.

14
15 My issues with you are -- they brought it up and
16 got me fired up, so I'll sit back down.

17
18 But my issues are with you personally in this
19 particular case -- well, nothing personal --
20 professionally in this case. I believe you could
21 have other roles. I don't believe they should be
22 here in this particular Commission room, and I do

1 reserve the opportunity to brief this further after
2 we get the transcripts and put things together,
3 sir. Thank you.

4
5 Do you have any questions for me, sir?

6
7 Presiding Officer: No.

8
9 DC: Thank you, sir.

10
11 Presiding Officer: So there is no confusion, I, in fact, did
12 rule on the Accused's request to go pro se. I
13 offered both sides an opportunity to draft a pro se
14 ruling. My ruling was issued on the 27th of
15 January; and a pertinent part, I say, "Based on the
16 provisions of Section 4(c)4 of the President's
17 Military Order, Paragraph 4(c) of Military
18 Commission Order Number 1 and Paragraph 3(d) of
19 Military Commission Instruction Number 4, the
20 Commission concludes that under the provisions
21 establishing the Military Commissions, an Accused
22 may not represent himself." I did not, despite

1 what anyone might categorize it, say what Mr.
2 Altenburg said was correct.

3
4 I did refer to Mr. Altenburg by saying, "The
5 reasons, therefore, are within the discretion of
6 the President and his delegee. Some of these
7 reasons are expressed in the Appointing Authority's
8 Memorandum of 14 June 2005, in which he ruled that
9 Mr. al Bahlul could not proceed pro se." I do not
10 accept the characterization that was made of my pro
11 se ruling at all.

12
13 I will state for the record that if I have had any
14 input on the PMO, the President's Military Order,
15 Military Commission Order Number 1, or Military
16 Commission Instruction Number 8, I am unaware of
17 it. If someone had asked me what I wanted done, I
18 would have been glad to tell them; but no one did,
19 and I didn't have any input.

20
21 I have, in fact, written a set of what I call
22 Presiding Officer's Memoranda. These memoranda, an

1 almost complete set, is contained at RE-139. An
2 updated list of them because myself and the other
3 Presiding Officers issued a new one is listed at
4 RE-157. Anyone who cares to review those will find
5 that they are rules of court establishing --
6 establishing procedure in cases that come before us.

7
8 I agree that I am not an active member of the
9 Virginia Bar. I state categorically that it is my
10 personal and professional opinion that there is no
11 one in the entire world more experienced with
12 running Military Commissions than I am.

13
14 I further state that to say that a person is
15 inexperienced in running a Military Commission when
16 none have been run, doesn't make much sense to me.

17
18 I agree that I have had no formal ethics training.
19 I don't dispute that, and I say nothing more about
20 that.

21
22 I have heard nothing that would say that I have had

1 any communications of any matter or any manner with
2 anyone other than on administrative matters
3 concerning the case of Mr. al Bahlul.

4
5 I do not believe that there has been any showing in
6 any way, shape, or form that I am not neutral in
7 this case. I'm not quite sure what is meant by the
8 term "detached." If it means that I am not
9 attached to one of the parties of the case, that is
10 correct. If it means that I am not involved in the
11 case, that is incorrect.

12
13 I am not responsible for e-mails that people send
14 me. I counted once, and the amount of e-mails I
15 get is horrific. Anyone can send me an e-mail,
16 unfortunately.

17
18 In referring to the comment about my lack of
19 qualifications, I refer all concerned to a C.A.A.F.,
20 case 53 M.J. 274, called *U.S. v. Steele*, which I
21 have considered.

1 Okay. I have not received a motion from either
2 side concerning the standard to be used in
3 determining the challenge for cause.

4
5 MCI Number 8, Paragraph 3(a) states, "The Presiding
6 Officer shall decide challenges for cause in
7 accordance with the standards established by the
8 Appointing Authority." In his 19 October 2004
9 memorandum, which is RE-153, the Appointing
10 Authority established a standard for challenges for
11 cause. I have used that standard. Based on that
12 standard, I find that I am qualified to serve on
13 this Military Commission as a Presiding Officer.

14
15 However, I note that when the Appointing Authority
16 established his standard on 19 October 2004,
17 Military Commission Order Number 1 of 21 March
18 2002, was in effect as was Military Commission
19 Instruction Number 8 of 31 August 2004.

20
21 Since that time, the Military Commission Order
22 Number 1 has been revised and reissued on 31

1 August 2005, and Military Commission Instruction
2 Number 8 has been revised and re-issued, I believe,
3 on the 16th of September 2005.

4
5 Those revisions made a significant change to the
6 duties and responsibilities of the Presiding
7 Officer. Consequently, there might be a question
8 as to whether or not the standard established by
9 the Appointing Authority is sufficient in his
10 memorandum of 19 October 2004, to be used as a
11 challenge for cause involving the member who is the
12 Presiding Officer.

13
14 Consequently, in an abundance of caution, I have
15 also considered and applied a modified implied bias
16 standard based in large part on Rule for
17 Court-Martial 902, which states in pertinent part,
18 "A military judge shall disqualify himself in any
19 proceeding in which that military judge's
20 impartiality might reasonably be questioned."

21
22 I note that this standard is much like the standard

1 used in the federal judiciary. Using and applying
2 the modified implied bias standard, I additionally
3 find that I am qualified to serve on this Military
4 Commission as the Presiding Officer.

5
6 Both sides are given leave to file supplemental
7 matters. Whoever files -- okay. Major Fleener,
8 will two weeks give you enough time?

9
10 DC: Of course. Yes, sir. Sir, I'm actually -- I have
11 scheduled leave March 11th through the 15th, that
12 week. So I have one more week of work before
13 scheduled leave. So I really have one week. So I
14 guess I'd either ask for --

15
16 Presiding Officer: Do you have a calendar with you? What is
17 21 days from today? The 22nd. If you choose to
18 make a supplemental, please submit it on the 22nd.

19
20 DC: Yes, sir.

21
22 Presiding Officer: If he so submits, please answer by the

1 29th?

2
3 A.PROS2: Yes, sir.
4

5 Presiding Officer: If he doesn't submit, you may do what you
6 want. You don't have to answer something that is
7 not submitted.
8

9 A.PROS2: Yes, sir.
10

11 Presiding Officer: Major Fleener, you submitted -- you
12 submitted yesterday D-102, a motion for
13 continuance. I received the government's response
14 D-102A yesterday evening or this morning. I'm not
15 quite sure which.
16

17 Do you wish to continue on with that motion or do
18 you just wish not to address it?
19

20 DC: Sir, I -- I'd like to address it briefly, if you
21 don't mind, sir. And I only want to address it
22 because of the government's response where they say

1 I'm irresponsible at best, disingenuous at worst.

2
3 I filed a motion to continue the proceeding because
4 I believed that Mr. al Bahlul had tuberculosis. I
5 believed this because I went to the camp and Mr. al
6 Bahlul was wearing a mask; all the guards were
7 wearing a mask. And before we could do anything,
8 my interpreter went in to talk to Mr. al Bahlul. I
9 stood outside for 40 minutes, and then finally --
10 in holding my mask, and then finally the guard was
11 -- she said, "You know why we have a masks?" I
12 said, "No." She said, "He has tuberculosis." So
13 God has anybody told anybody.

14
15 The interpreter left, was -- hopefully he's okay.

16
17 I went to the guard shack and said, "You need to
18 tell somebody. Find out what's going on."

19
20 We called the JAG office, and the JAG -- I said,
21 "They say he has tuberculosis. What -- you need to
22 let people know so we can figure what's going on."

1 And I said, "Is there -- can I talk to the medical
2 officer?"

3
4 The JAG office said, "No, I've got it." "Are you
5 sure?" "No, I've got it." Okay. "Where is your
6 cell phone?" And I gave him a cell phone number.
7 And I said, "Let me know what's going on."

8
9 I left the office thinking he had tuberculosis I
10 think reasonable.

11
12 I come back. I file a motion that says he has
13 tuberculosis, and then I get this response saying
14 I'm disingenuous and irresponsible -- I'm sorry --
15 irresponsible at best, disingenuous at worst. And
16 then when you read their response, I bet he has
17 tuberculosis. Because they say that he doesn't
18 have active tuberculosis. Oh, I didn't say that he
19 had active tuberculosis either because I was just
20 too freaked out that there was tuberculosis
21 floating around and that no one had bothered
22 telling anybody.

1
2 So for them to then come back and give me a
3 doctor's report saying, well, he doesn't have -- he
4 doesn't have active tuberculosis, but apparently
5 he's been exposed to tuberculosis. And when you
6 look at the doctor's -- when you look at the
7 doctor's affidavit that was submitted on the end of
8 their -- on the end of their response, it's missing
9 dates. It says, "He was exposed to tuberculosis,
10 came up hot for being exposed in 2002, and now
11 X-rays and everything else says he's fine." But
12 there were no dates on these X-rays.

13
14 So do I think Mr. al Bahlul has tuberculosis? I
15 have no idea. I hope he doesn't. And -- but for
16 them to come out and say that I'm disingenuous and
17 irresponsible because I go to their camp and
18 everyone is walking around with masks and saying he
19 has tuberculosis and I file the motion that says,
20 he has tuberculosis, I'm glad he doesn't have
21 tuberculosis. That wasn't irresponsible; it wasn't
22 disingenuous.

1
2 So, I say that because I'm mad. I'm not glad that
3 Mr. al Bahlul doesn't have tuberculosis. I'm angry
4 that they would call me names when all the
5 information I have is he had tuberculosis. And I
6 have nothing more to say about that, other than I
7 will assume that he doesn't have active
8 tuberculosis because I don't know this doctor. I
9 am going to check to make sure that he is okay.
10 But I will withdraw the motion to continue.

11
12 I would ask that I not be called names anymore for
13 no real reason whatsoever. I've been irresponsible
14 and disingenuous on other things, not this one.

15
16 Presiding Officer: Okay. I will not act on the motion for a
17 continuance, which since it is now six and a half
18 hours after we first met, seems only correct.

19
20 If you wish to renew it at a later time, you may.

21
22 A second thing, is it your wish, Major Fleener,

1 that -- I'm making a hypothetical -- that if
2 tomorrow morning when the guards go to his cell, he
3 says, "I do not want to go to the building," is it
4 your wish that I order him removed forcibly from
5 his cell to come to this building?

6
7 DC: No. However -- and I spoke with Mr. al Bahlul
8 about this issue. The only time these detainees
9 are given choices is to meet with their lawyer and
10 now to come to court. And if that -- those are the
11 only two choices surprisingly enough, there will be
12 very few detainees that will come to court and few
13 -- I believe so.

14
15 Presiding Officer: Did you just say there will be very few
16 detainees that come to court?

17
18 DC: That will come. I believe that if they're given
19 the choice to sit in their cell or come to court,
20 Mr. al Bahlul will not be the first person to not
21 sit in that chair. Maybe not, I don't know. I've
22 only been here three and a half months.

1
2 My experience with Mr. al Bahlul and the detainees
3 is that it appears the only choice they have in
4 life is whether they'd like to come and meet with
5 their lawyers, and we wonder why there are problems
6 with detainees meeting with their attorneys.

7
8 With that being said, I don't want to force myself
9 on anybody and these proceedings should not be
10 forced on anybody.

11
12 If Mr. al Bahlul is asked very kindly at the prison
13 would you like to come to court today, he is going
14 to say, no, and he's going the sit there.

15
16 If they say, Mr. al Bahlul, it's time for court.
17 He will come very peacefully and sit in that back
18 room.

19
20 So I would ask that when he's invited to court that
21 he be invited to court in the same manner he was
22 invited every other day and that suddenly today

1 shouldn't give the folks at the prison the
2 opportunity to now give him a chance to not come to
3 court.

4
5 I don't believe he will be -- in fact, I know he
6 won't be -- be violent or will be -- or will fight
7 coming to court. I just want to make sure they
8 don't just ask him politely if he wants to come.
9 Do what they do every single other day, sir. There
10 won't be an issue. If there is an issue, they
11 should not bring him forcefully.

12
13 Presiding Officer: Okay. Trial counsel, will you
14 communicate with the JTF personnel and ensure that
15 tomorrow morning they conduct themselves as they
16 did this morning and on the morning of 11 January
17 2006.

18
19 PROS: Yes, sir.

20
21 Presiding Officer: If Mr. al Bahlul refuses to leave his
22 cell, then he will not be brought here -- he will

1 not be extracted forcibly from his cell.

2
3 PROS: How does that protect the government's position
4 later on if he claims that he really did want to,
5 they just didn't want to bring him over, Your
6 Honor? Without having it from the horse's mouth
7 himself that it is his decision, that he
8 understands the ramifications of not being in the
9 proceedings here, it leaves us wide open for a
10 claim from the defense. And having been an
11 appellate counsel for five years, I know it very --
12 I can almost quote you the law that they're going
13 to use when they make that claim, Your Honor.

14
15 Presiding Officer: I would suggest that at 0300 or 0400 when
16 you -- when Mr. al Bahlul wakes up or is woken and
17 asked to leave his cell, if he doesn't want to
18 come -- doesn't want to leave his cell, that
19 someone, an NCO of some sort, sit there and explain
20 it to him and be prepared to come testify as to
21 what he told him.

1 PROS: So I'm to have an NCO explain to Mr. al Bahlul his
2 legal rights --

3
4 Presiding Officer: No.

5
6 PROS: -- at this proceeding?

7
8 Presiding Officer: No. His legal right to come here.
9 That's all --

10
11 PROS: Okay, sir.

12
13 Presiding Officer: -- I want him to say.

14
15 PROS: Okay. Will do.

16
17 Presiding Officer: If you believe I'm not protecting your
18 interest, please tell me. I'm glad to do whatever
19 you want.

20
21 PROS: Sir, I'll be discussing it upstairs. And like you
22 said, this is something we're going to talk about

1 tomorrow morning; but obviously since we're
2 bringing him back tomorrow morning, we have to
3 decide beforehand. So we'll do it the way you're
4 saying it at this point in time; and if we think it
5 needs to be done differently, we'll raise that with
6 you, sir.

7
8 Presiding Officer: Okay. Anything further tonight?

9
10 PROS: We have one more motion, I believe.

11
12 Presiding Officer: Tonight?

13
14 PROS: Or are we doing that tomorrow is that --

15
16 Presiding Officer: We're going to meet tomorrow at 0900.

17
18 PROS: All right.

19
20 Presiding Officer: Anything else further tonight, Major
21 Fleener?

1 DC: No, Your Honor. But I believe that Mister -- well,
2 you know, I -- Guantanamo Bay is an interesting
3 place. And I'm sure when I come here tomorrow,
4 Mr. al Bahlul won't be here because that is just
5 the way things have worked for me recently.

6
7 Our conversation back there, he gave me
8 authorization to let you know he's not going to
9 fight coming to court -- coming to the courthouse.
10 So as long as every day goes like -- if tomorrow
11 goes like every other day and they say, come on,
12 Mr. al Bahlul will -- I -- no, nothing else. I
13 would just -- I'm anxious to see what happens
14 tomorrow morning.

15
16 Presiding Officer: Major Fleener, would you like it if I
17 gave instructions to the prosecutor that if they
18 hear -- if the guard hears, no, I am not going to
19 come to the courthouse, that they call you on your
20 cell phone?

21
22 DC: I just remembered what usually happens, sir, is

1 that they will ask him, do I -- it's time for
2 court. He says, "Do I have to go?" They say,
3 "yes," and then he comes peacefully. If they say,
4 it's up to you, he's going to say, no, and then
5 he's going to sit in his cell. I would ask him to
6 say, yes, he has to come to court.

7
8 Presiding Officer: Okay. They've got that. They're busily
9 writing. My question is, if he says, no, do you
10 want them to call you on your cell phone?

11
12 DC: Sure. I don't know what my phone number is.

13
14 Presiding Officer: You get with the Trial Counsel after this
15 session.

16
17 DC: Yes, Your Honor.

18
19 Presiding Officer: And you-all can call phone numbers until
20 you find it.

21
22 Trial, any questions on that?

1
2 PROS: No, sir. But he does have a cell phone? The only
3 reason why I ask is because I didn't feel the need
4 to defend myself on his allegations of the name
5 calling and whatnot --

6
7 Presiding Officer: Okay. I don't want to hear it --

8
9 PROS: -- but a 35 second phone call to fix that to the
10 medical center, he knows very well how to contact
11 those individuals. I thought it was --

12
13 Presiding Officer: Colonel [REDACTED] please be seated.

14
15 PROS: Thank you, sir.

16
17 Presiding Officer: Major Fleener, you have already had your
18 opportunity, and I won't listen to anymore on that.

19
20 You get with each other and get the cell phone
21 issue straightened out. If you have any questions
22 or any problems, you-all can find me.

1

2

We'll start at 0900 tomorrow morning.

3

4

The court's in recess.

5

6

The Commissions hearing recessed at 2000, 1 March 2006.

1 The *Commissions* hearing was recalled to order at 0900, on 2
2 March 2006.

3
4 Presiding Officer: The court will come to order. Please
5 account for the parties.

6
7 PROS: All parties who were present at the recess of the
8 hearing last night are again present.

9
10 I note that the Accused is still absent.

11
12 The defense interpreter, while he is not at the
13 defense table, is in fact the courtroom.

14
15 Presiding Officer: Major Fleener, did you have an
16 opportunity to talk to Mr. al Bahlul?

17
18 DC: I did, Your Honor.

19
20 Presiding Officer: I presume there wasn't any -- anything
21 going out of the -- coming out of the cell that you
22 want to comment on?

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DC: No, sir.

Presiding Officer: Okay, good.

Major Fleener, the Commission has received D-103,
your motion to quash the proceedings, and D-103A
the prosecution's response thereto.

The Commissions has not received a reply from you.

Do you have any oral argument to supplement the
argument made in your brief?

PROS: Your Honor, before he starts, I hate to interrupt.
But the voluntariness to have absence of Mr. al
Bahlul -- I noticed that Major Fleener did talk
with him. Is he going to share with us whether or
not this is a voluntary absence on the part of his
client?

Presiding Officer: Major Fleener, did you advise Mr. al

1 Bahlul that he can be here?

2
3 DC: I did.

4
5 Presiding Officer: Did he choose not to be here?

6
7 DC: He did.

8
9 Presiding Officer: Is that sufficient?

10
11 PROS: Sir, there are going to be people reviewing this
12 event.

13
14 Presiding Officer: No, is that okay?

15
16 PROS: Yes, sir.

17
18 Presiding Officer: Okay, Major Fleener, we're back to D-103.

19
20 DC: Sir, D-103 is a motion to quash the order directing
21 the hearing of yesterday, the hearing of evidence
22 and essentially the gist of the argument also is

1 that -- or the relief requested is that the entire
2 Commission must sit to decide both my withdrawal
3 request and Mr. al Bahlul's self-representation
4 request since the two are intertwined.

5
6 The President doesn't give you the authority to
7 decide these issues alone.

8
9 He didn't give that authority when he signed the
10 Presidential Military Order 2001. That is how it
11 was understood through 2004 and, Your Honor,
12 yourself said the President has us all -- has all
13 of us members sitting as triers of law and fact.

14
15 Several times on the record in *United States versus*
16 *Hamdan* and in *United States versus Hicks*.

17
18 The question regarding whether you could hold
19 sessions by yourself went forward, and was, I
20 believe, certified as an interlocutory question up
21 to the Appointing Authority and the Legal Advisor
22 to the Appointing Authority. In August of 2004

1 cites the President's Military Order requires a
2 full, fair, and trial -- full and fair trial with
3 the Military Commission sitting as the triers --
4 triers of both law and fact.

5
6 The President's Military Order hasn't changed. The
7 Military Commission Order apparently has changed
8 and now the United States, while they have held up
9 the President's Military Order as being the law,
10 and pummeled me with it over and over again. Now,
11 they want to say, well, it doesn't really matter,
12 it's the MCO that is the important document in this
13 case.

14
15 And it's just not true. And they -- the President
16 used the words "triers of law in fact" to be triers
17 of law in fact. There were -- there have been
18 other pleadings and other Commission cases that
19 which have been filed but haven't come before you,
20 sir, where the -- the discussion between what is a
21 trier versus a triers, and we shouldn't get caught
22 up in singular versus plural and what that "S"

1 really means.

2
3 Well, what that "S" really meaning is triers.

4
5 Is they will sit here and hear the question of law
6 and fact.

7
8 I understand the Military Commission Order now as
9 amended in 2005 has tried to make you look more
10 like a military judge, but that is not what the
11 President intended and we know it; because he took
12 the order from 1942 that President Roosevelt used.

13
14 That is where he got his order.

15
16 And in 1942 it said the exactly the same thing. In
17 1942 the Military Commission members as triers of
18 law and fact.

19
20 In the history of Military Commissions -- there has
21 never been a Commission where we had split duties
22 between a presiding officer doing some things and

1 the Commission members doing other things.

2
3 This is a common law court.

4
5 They have said so two dozen times when it benefits
6 them. Unfortunately, they don't want that now so
7 it's no longer apparently a common law court.

8
9 No Commission in history. Look at precedent.
10 1942, the Presidential Order that is where it was
11 grabbed that is where President Bush used that's
12 the order he used to get this order in place.

13
14 What did they do in 1942? It would make good sense
15 to look at what happened in 1942 since the order is
16 identical to determine whether you can sit by
17 yourself and the answer is of course no.

18
19 The -- they want to give *Chevron* deference to the
20 administrative agency and the rulings of
21 administrative agency -- well, that is -- *Chevron*
22 deference certainly is a -- is a term of Article,

1 it's a legal principle, but it doesn't apply here.

2
3 This is a criminal court, and in a criminal court
4 you don't give chevron deference.

5
6 What you do use is something that is contrary to
7 chevron deference but just as powerful -- arguably
8 more powerful. It's existed certainly longer which
9 is the rule of lenity, a common law rule, which has
10 the statutes in criminal court should be construed
11 if ambiguous to the favor of the guy that's being
12 charged.

13
14 You don't give deference to the United States or to
15 the agency -- or the entity who is prosecuted in a
16 case.

17
18 And that's been mentioned over and over throughout
19 history.

20
21 So for you to give deference to the Secretary of
22 Defense and allow him to change his order in the

1 middle of it just because he wants to, it -- it
2 flies in the face of -- it certainly flies in the
3 face of the President's Military Order, it flies in
4 the face of precedent and it flies in the face of
5 basic system of justice that we've been arguing
6 time and time again that this Commission is a --
7 has a certain amount of failing to it. This is an
8 example of that failing.

9
10 Mr. al Bahlul sat here one year ago -- a year and a
11 half ago, with all of the members here.

12
13 Now, he's sitting -- well, now he's not here. But
14 presumably had he been sitting here -- and he was
15 sitting here for the last day and a half -- they're
16 gone. Imagine trying to explain that to a guy,
17 where the rules have changed because the Secretary
18 of Defense has decided to change the rules after
19 you have already started your process. And that
20 issue hasn't been briefed and I was thinking about
21 that last night.

1 I don't know. Maybe MCO 1 can apply to the other
2 guys, I don't think so, but maybe it can, but it
3 can't apply to the original four I don't believe.

4
5 Those are fundamental changes in the trial system.

6
7 And again, that's not an issue before you now.

8
9 If you rule consistent with the United States and
10 try to say this is not fatally flawed and it's okay
11 to drive on, the next motion you should expect to
12 see probably not from me, because I don't believe
13 I'll be filing any more motions in the case because
14 of what Mr. al Bahlul would like me to do. But in
15 one of those cases is going to be that the
16 Commission order -- you have got to at least use
17 the old Commission order for the older cases.

18
19 They ask you in their reply to give a certain
20 amount of deference to the -- the meaning of
21 Presidential silence. And that Presidential
22 silence in this case, should be construed some how

1 to bless the actions of the Secretary of Defense.

2
3 All they had to do, if they wanted it the thing set
4 up the way they want the thing set up now is to
5 have the President do a new order. They didn't do
6 it because they didn't want to take it to the
7 President and make him do a new order and say,
8 "President either you were wrong two years ago or
9 three years ago or we were wrong when we advised
10 you three years ago," and now they're asking you to
11 bless it.

12
13 The defense position in this regarding how triers
14 of law and fact must be read, it's not just a
15 reasonable interpretation, it's the only reasonable
16 interpretation. And the defense re-- in the
17 government response to my motion, they cite the
18 UCMJ as some sort of authority because it mentions
19 court-martial has various members, and therefore a
20 Commission has various members, and drawing some
21 sort of twisted analogy that therefore because the
22 court-martial in one portion of the statute doesn't

1 say that -- doesn't delineate the various roles but
2 that the rules for court-martial delineate the
3 various roles that therefore the statute itself is
4 okay because the rules are consist.

5
6 And I do give credit to the United States because
7 they did go on to cite that there is a reason for
8 that, which is that the rest of the Uniform Code of
9 Military Justice actually statutorily creates
10 various rules and gives various positions and
11 various duties.

12
13 So the UCMJ and the role of the pre -- excuse me,
14 the structure of the Uniform Code of Military
15 Justice in a court-martial system doesn't have any
16 effect here. We would love a court-martial. We
17 have been screaming about that for four years when
18 I was in Wyoming. They won't give him a
19 court-martial. They want to give some of the
20 structure but none of the protections.

21
22 It's not right. It's not full and fair. If you

1 want a court-martial, make it a court-martial. If
2 you are not going to make it a court-martial,
3 comply with the President's order and make it a
4 common law Military Commission.

5
6 Presiding Officer: Trial?

7
8 PROS: Yes, sir, Your Honor, our first contention is that
9 the motion is untimely and dismiss it on that
10 basis.

11
12 Presiding Officer: Thank you. Go on.

13
14 PROS: Our second one is that we'll rest on our motion as
15 it's written unless you have questions about it.

16
17 Thank you.

18
19 Presiding Officer: It's going to be pretty hard for you to
20 reply to that, isn't it?

21
22 I'm going to think about this. I am going to ask

1 if the parties will agree to the following matters
2 that are perhaps not in everyone's mind as much as
3 they were with someone who has been here the entire
4 time.

5
6 Military Commission Instruction 8 was originally
7 issued on the 30th of April 2003.

8
9 This is all in the web site. So if you all don't
10 like it, I will make RE's out of it.

11
12 And Paragraph 5 of that stated in pertinent part:
13 The presiding officer shall execute functions
14 including the presiding officer shall rule on
15 appropriate motions or at his discretion consistent
16 with reference A, which is the MCO, the old MCO,
17 submit them to the Commission.

18
19 That is in Paragraph 5 of the April 30th 2003,
20 MCI 8.

21
22 In your voir dire materials that you submitted,

1 Major Fleener, on specifically Question 30, that is
2 on RE-156, you referenced a memorandum that I
3 issued to all counsel -- actually, it was a set of
4 four e-mails between myself and Colonel [REDACTED]

5
6 *RE 167 was marked at this time.*

7
8 That e-mail -- the set of e-mails has been marked
9 as RE-167. I wrote that e-mail -- the exchange
10 between myself and Colonel [REDACTED] was based upon the
11 MCI which I've just cited, an MCO 1, dated 21 March
12 2002, once again on the web site. I'm not going to
13 make an RE unless someone wants to.

14
15 In that e-mail, and subsequent actions, I scheduled
16 a session at Guantanamo by myself with no other
17 Commission members present. As you further pointed
18 out in your voir dire materials, the Legal Advisor
19 to the Appointing Authority then issued a letter
20 stating that the Commission must have the Presiding
21 Officer and all the members present to conduct any
22 activities.

1
2 That was of course despite the MCI matter I just
3 read.

4
5 In response to my direction to hold a session with
6 just myself and after the Legal Advisor to the
7 Appointing Authority wrote his memorandum, I came
8 to Guantanamo and held a session -- held four
9 sessions -- well, held sessions in four cases with
10 various members.

11
12 And about a week after I left Guantanamo, MCI 8,
13 dated 31 August 2004 was reissued, and the motions
14 matter that I read from Paragraph 5 was taken out
15 of that Paragraph 5.

16
17 Let's mark General Hemingway's memorandum.

18
19 General Hemingway's memorandum of 11 August 2004
20 subject "Presence of members and alternate members
21 at Military Commissions" is now marked as RE-168.
22

1 At the sessions in *Hamdan* and *Hicks*, I did state on
2 the record that the President said you're going to
3 have to decide all questions of law and fact
4 because that is the instructions I got. However,
5 moving right along, on the 31 of August 2005, the
6 secretary issued -- reissued MCO 1, and on the 16th-
7 of September 2005, the General Counsel reissued MCI
8 8. And those are the current versions that we have
9 before us.

10
11 I think it's important to understand the paperwork
12 trail before we go on and consider this motion --
13 certainly before I go on and rule on it.

14
15 So I'm going to consider that and I'll think about
16 the motion, and I will issue a ruling before we
17 recess for good today.

18
19 Presiding Officer: You want to say something?

20
21 DC: Sir, I don't know if I will have the time or the
22 need to supplement my brief, but I did haven't time

1 to do a reply. So I would like to at least have
2 the opportunity to think about it for an hour and
3 do a reply if necessary or at least a supplemental.
4

5 I don't think I need to, I would just like an
6 opportunity to do that and have a short amount of
7 time to think about it.
8

9 Presiding Officer: You got it.
10

11 DC: Thank you, sir.
12

13 Presiding Officer: Major Fleener, you asked yesterday, if I
14 had learned anything from the *Kreutzer* opinion and
15 I, in fact, did. The thing I learned, basically,
16 the one thing that all three judges at ACCA, the
17 Army Court of Criminal Appeals agreed on was the
18 ineffectiveness of counsel and therefore I'm quite
19 a tuned with that.
20

21 Mr. Hodges publishes on my behalf a filings
22 inventory which counsel receive. It reflects what

1 the Commission received. It doesn't reflect why or
2 why not a certain matter was or was not filed.

3
4 Looking at the filings inventory and looking at
5 other matters, I'm concerned and perhaps based on a
6 comment you made just a little while ago you're
7 going to be able to clear up my concern, that
8 you've had a lack of activity or inactivity in
9 these cases and I want to make sure that the
10 filings inventory is correct and I want to make
11 sure that you realize that the effective of your
12 inactivity on these matters.

13
14 So I got several questions I want to ask.

15
16 One of them goes along with what the trial said.

17
18 On the record on 11 January, you moved to abate
19 based on perceived conflict between the MCO and the
20 PMO. I offered you an opportunity to brief the
21 issue. You didn't request an extension of time to
22 file the motion and you didn't file the motion

1 until yesterday.

2

3 Is that right?

4

5 DC: Yes, sir.

6

7 Presiding Officer: Was that a conscious decision on your
8 part?

9

10 DC: Yes, sir.

11

12 Presiding Officer: Why?

13

14 DC: Most of that is privileged, but the gist of it is
15 until I heard back from the Iowa bar, I didn't
16 believe I could do any filings on his behalf. I
17 heard back from the Iowa bar on Friday.

18

19 Presiding Officer: Major Fleener, I was in court and I
20 ordered you to represent him?

21

22 DC: Yes, sir.

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Presiding Officer: So what question did you have?

DC: Whether -- whether the Iowa bar was going the
 make -- essentially say that you could order me to
 represent you -- him.

Presiding Officer: Major Fleener, I told you to represent
 him, I told you were representing him.

DC: Yes, sir.

Presiding Officer: You had no other authority to not
 represent him. I mean you didn't have SOCO saying
 you didn't have to represent him, you didn't have
 Iowa saying you didn't have to represent him.

DC: I didn't have Iowa saying I did. So that is why it
 was under question.

Presiding Officer: Well, I understand that. Until Iowa
 answered you were supposed to do what you were

1 told?

2
3 DC: I was doing what I was -- I was doing all I could
4 do that was necessary in order to preserve Mr. al
5 Bahlul rights, act within the scope and goal of Mr.
6 al Bahlul's representation if I was serving that
7 interest and not acting outside of my authority
8 with Mr. al Bahlul. It's not simply that Mr. al
9 Bahlul sits in the back room and I just try his
10 case for him. There is a very real question that
11 is going to come up which is, what do I file when
12 he tells me you file nothing you boycott with me.

13
14 What is the answer then?

15
16 Presiding Officer: Well, I'm asking you. Did he tell you
17 that?

18
19 DC: Right. I don't have any idea. That is what I've
20 been hoping to try and avoid.

21
22 Presiding Officer: Did he tell you that? Do you have those

1 instructions?

2
3 DC: Right now, almost. This is an issue -- you know,
4 sir, there is a second circuit case *United States*
5 *versus Torres*. I don't have the cite but it did a
6 wonderful job of addressing the issue like Mr. al
7 Bahlul's.

8
9 What the court did in *Torres* is recognized that a
10 person has the right to control the goal and -- the
11 goal of their representation, and that the court
12 didn't force the lawyer to make additional filings.
13 In fact it was a -- it was a case where the client
14 fired the lawyer, the judge let the client fire the
15 lawyer. She went pro se, they appointed standby
16 counsel and then she boycotted.

17
18 And like Mr. al Bahlul. And the second circuit did
19 a great job of discussing what the Federal District
20 Court did well in that case which was understand
21 that the goal -- a legitimate goal of
22 representation may be a political statement. In

1 this case Ms. Torres was a Puerto Rican Separatist
2 and that its legitimate goal of representation not
3 to participate. Now, in that particular case the
4 benefit that Ms. Torres -- I guess it wasn't her
5 benefit -- the benefit that the attorneys had that
6 were appointed as standby counsel is that they were
7 appointed as standby counsel in Ms. Torres' case
8 because the court recognized that a lawyer can't
9 represent somebody who is perfectly competent and
10 try to make these decisions for them when they have
11 no idea what the person want them to do.

12
13 That is what the District Court in New York did.

14
15 Recognized that, went standby counsel, used terms
16 as -- like friends of the court and had -- like you
17 did with [REDACTED] and [REDACTED] two years ago. Had
18 them file pleadings advocating various positions.
19 But they didn't put the lawyer in position of
20 having to make decisions when they make absolutely
21 no idea what decisions to make and the decisions
22 they make may very well be against what their

1 client, if they are the client, wants them to do.

2
3 I have struggled with it, I have -- I don't know --
4 six lawyers that I talked to about this.

5
6 You have all sorts of various opinions as to
7 whether we serve as guardians or whether we serve
8 as representative and if I am a representative and
9 I'm Mr. al Bahlul's voice and he says boycott, I
10 boycott unless I have a reason to believe he is not
11 competent. If I am his guardian, which I don't
12 believe I am. But I believe I'm something in
13 between, then I try to make decisions which would
14 be in his -- in his best interest, but the law
15 isn't set up to deal with people like Mr. al Bahlul
16 in this particular situation other than to let him
17 represent himself.

18
19 Presiding Officer: Well, the law is not set up to that in
20 this particular situation.

21
22 DC: I know --

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Presiding Officer: Go on.

DC: Yes, sir, and that is why this thing is fatally flawed.

Because -- well, it is, because it -- you're putting -- you're having me make these decisions and I don't have any idea what he wants and if I -- if I don't do anything, is that the right answer? If I make a bunch of filings and vigorously contest this system to show that I could test the evidence, I cross-examined the witnesses, I filed pleadings and motions, tried to beat the government's case, do a wonderful job and Mr. al Bahlul gets sentenced. All that does is validate his problems with the system that this is not a fair trial. I give him a fair trial he's unhappy because got the fair trial.

I have no idea what the answer is.

1 You call it inactivity for the last couple of
2 months. I have done my best. I'm doing my best.
3 What I believe -- I'll tell you right now, what
4 believe what I have a duty to do is -- my duty is
5 to Mr. al Bahlul. My duty to Mr. al Bahlul is to
6 vindicate his right to self-representation and try
7 to get him a lawyer. I will do whatever I have
8 possibly can. If I have to go to federal court I
9 can go -- I'll go to Yemen. I will -- I will sue
10 somebody somewhere to get him to represent himself
11 or have a Yemeni lawyer.

12
13 Presiding Officer: Pardon me. Did you say you will see or
14 sue somebody to get --

15
16 DC: I'll sue somebody somewhere. I want this -- he
17 needs his own attorney. He -- he doesn't want me,
18 and he doesn't -- can't be forced, I don't believe,
19 to have me.

20
21 We can argue about this all day long.
22

1 Outside of that, sir, I understand that I have a
2 duty to the Tribunal. I disagree with the Iowa
3 bar, the duty of loyalty to the Tribunal is
4 something that is -- I notice that there were no
5 citations to that statement because it's not true.
6 No disrespect. I have a duty to candor, I have a
7 duty to follow instructions, a duty to be
8 respectful. I have a duty to ask for extensions.
9 I didn't do that and for that I apologize and I
10 believe that I did owe you a duty to ask for a
11 delay. It wasn't intentional. It was -- I had a
12 lot of stuff going on.

13
14 But at the end of the day my duty to Mr. al Bahlul
15 is to represent his interest I don't know what
16 those interests which is why I need time to try and
17 develop an attorney/client relationship with this
18 man. Hopefully I can develop that. If not, I have
19 to get him a lawyer that he will listen to or try
20 to vindicate his right to self-representation. If
21 I can't do that or once that is exhausted, then
22 we're at the cross roads where the question is what

1 do you file, what do you not file. I don't want to
2 get there because that would be bad for Mr. al
3 Buhlul, I believe.

4
5 So I'm doing the best I can.

6
7 Presiding Officer: The problem is that -- Trial, you don't
8 have to stand up. That as Trial is about the stand
9 up and say, we've been past those cross roads.

10
11 The law motions were due on the 22nd of February.
12 You filed none nor did you request any extensions,
13 and the problem is that -- listening to you that
14 appears to have been a conscious decision on your
15 part not to file any law motions nor to request an
16 extension.

17
18 DC: Not the extension, sir, not failing to file the
19 extension that was just a -- I should have asked
20 for an extension.

21
22 Presiding Officer: Yes, Colonel [REDACTED]

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PROS: Approximately -- we had a phone conversation
 approximately a week before the February 22nd
 deadline. I flat-out reminded him of the deadline
 that he needed to let you know or ask for an
 extension if he wasn't going to file any motions by
 that time.

 So for him to say that it slipped his mind is
 simply not an accurate statement.

Presiding Officer: Thank you. Please, let's not go into
 that.

 The problem is that the extensions were not filed.

 The problem is that with neither motions nor
 extensions a reasonable person would conclude --
 could conclude based on the failure to file motions
 among many, many other things, that the defense
 believes that the President's Military Order is
 lawful, and that the Commission has jurisdiction

1 over your client, that you believe that your
2 client, the defense believes that Mr. al Bahlul
3 either: A, received a proper GPW, Geneva Prisoners
4 of War, Article 5 determination; or B, that one is
5 not necessary; or C, as the D.C. circuit said the
6 Commission is a competent tribunal.

7
8 Could also conclude that the defense believes that
9 a conspiracy is a substantive offense recognized
10 under the law of war.

11
12 Could conclude that the defense believes that the
13 charges and specifications are proper, conclude
14 that the defense believes that Mr. Altenburg is in
15 fact a proper Appointing Authority, conclude that
16 the defense believes that there has been no denial
17 of speedy trial, conclude that the defense believes
18 that MCO 1 is consistent with international law.

19
20 There are all sorts of things that failing to file
21 motions does, and that is what a reasonable person
22 would conclude from a failure to file motions and a

1 failure to request time for an extension. I'm just
2 pointing this out to you and -- let me go on.

3
4 On D101 A, the -- D1001 the motion to preserve
5 evidence, you filed the motion, the prosecution
6 filed a response and you didn't file a reply.

7
8 I don't know why you didn't file a reply. Was that
9 intentional?

10
11 DC: I didn't think I needed to file a reply.

12
13 Presiding Officer: That's fine.

14
15 I sent the errata, the transcript for the
16 11 January session out to all parties and I
17 received no errata from you. I think I got 12
18 pages from the prosecution.

19
20 Was that a conscious decision on your part not to
21 file the errata?

1 DC: I don't know.

2

3 Presiding Officer: Okay. You realize a reasonable person
4 could conclude based on failure to file -- not
5 filing errata, that the defense believed the
6 transcript was accurate.

7

8 Actually, I happen to believe it was since I was
9 the one that signed it. But you didn't provide any
10 comments on the wording of the discovery or motions
11 on provisions of discovery.

12

13 And even though that was both those were invited by
14 the discovery order itself, was that a conscious
15 decision not to -- not to make any comments or
16 challenge the discovery order?

17

18 DC: I don't know, sir.

19

20 Presiding Officer: Okay.

21

22 You stated on the record that there was no formal

1 mechanism in place in Wyoming to ask for an ethics
2 opinion. On the 24th of January, the prosecution
3 furnished all parties the Wyoming code that
4 contains it. Have you filed a request to Wyoming
5 for an ethics opinion?
6

7 DC: I have, sir.
8

9 Presiding Officer: You have.
10

11 DC: Yes, sir.
12

13 Presiding Officer: When did you file that?
14

15 DC: I filed it, essentially, twice. I had -- I had
16 informally requested an opinion from the bar back
17 in October, and I verified -- and I was told that
18 they weren't going to provide an opinion. And I
19 verified that with a letter approximately two weeks
20 ago.
21

22 Presiding Officer: Is there a reason why you haven't given

1 the Commission a copy of this request?

2
3 DC: Other than it's work product.

4
5 Presiding Officer: Pardon?

6
7 DC: It's my work product.

8
9 Presiding Officer: Your request for an opinion to the Iowa
10 bar?

11
12 DC: Was my work product too, but everyone grabbed it,
13 supplemented it and took it over as their own
14 request, respectfully, sir.

15
16 Presiding Officer: So there is no question, Major
17 Fleener, -- well, we'll get -- we'll get to that.

18
19 You haven't provided any comments on the protective
20 orders. Was that a conscious decision on your
21 part?

1 DC: I don't know, sir.

2

3 Presiding Officer: Other than your request, which I granted,
4 that I not hold an 8-5 session, you didn't provide
5 any comments on the drafted trial schedule. I know
6 you got it because we've discussed it. Was your --
7 did you just feel there was nothing you needed to
8 comment on in that draft trial schedule?

9

10 DC: I don't know. Is the draft trial schedule for what
11 was going to happen in February, sir?

12

13 Presiding Officer: This month, you know, with the times for
14 the motions and times for the sessions --

15

16 DC: I -- I don't know if we're talking about the same
17 thing. The document that I got was essentially a
18 calendar saying that there was an 8-5 scheduled one
19 day there was a -- this hearing was scheduled for
20 another day. I did request we not have an 8-5 and
21 I moved that we continue this hearing.

22

1 I didn't know it was something available for
2 comment.

3
4 Presiding Officer: RE-149 is the draft trial schedule.

5
6 In trial schedule, Paragraph 1 -- or 2 says
7 discovery order motions are due in accordance with
8 the discovery order. Law motions are due on 22
9 February 2006; evidentiary motions are due on 29
10 March 2006. That's the draft trial schedule, like
11 I said, it's already 149. And I didn't get any
12 comment saying hey, I need more time for whatever
13 or not ever. Is that a conscious decision on your
14 part?

15
16 DC: Sir, I can say right now that -- and I apologize to
17 you for not asking for an extension for filing what
18 you term law motions.

19
20 I asked for an extension right now on all motions
21 so that I can -- all motions be filed.
22

1 Presiding Officer: We'll get to that. I'm just trying to
2 figure out what this stuff is I have here. You can
3 ask me for that later?
4

5 DC: Yes, sir.
6

7 Presiding Officer: I said on the record that I would provide
8 counsel a draft of my pro se ruling. I then on the
9 12th of January sent an e-mail to all counsel saying
10 nope, I'm not going to provide a draft. You all
11 may provide me a pro se -- a draft pro se ruling
12 and I'll consider it in drafting mine. You didn't
13 send in a draft pro se ruling. Was there a reason
14 for that?
15

16 DC: That was a conscious decision.
17

18 Presiding Officer: That was a conscious decision, okay.
19

20 At the 11 January session you moved to abate based
21 on your interpretation of an instruction which was
22 later determined to be Appointing Authority

1 regulation number three. I denied the motion
2 because you didn't have the document and you
3 couldn't point it to me. But I gave you leave to
4 brief the motion later.

5
6 This was the conflict between ethics opinions.

7
8 You didn't brief it later. Was that a conscious
9 decision?

10
11 DC: I don't know.

12
13 Presiding Officer: Okay.

14
15 On the record, you stated that you had provided
16 copies of the request that you made to the chief
17 defense counsel to withdraw. I have not received
18 them.

19
20 Was that conscious or --

21
22 DC: I thought you had. I intended to, if you hadn't

1 then it wasn't a conscious decision not to send
2 them to you. It was a conscious decision to send
3 them to you and for some reason you didn't get
4 them. You will get them today. I have them
5 upstairs.

6
7 Presiding Officer: Okay. I'll wait for them. Give them to
8 Mr. Hodges?

9
10 DC: Yes, sir.

11
12 Presiding Officer: Considering all those matters, you
13 understand that a reasonable person could conclude
14 that you have waived those matters that you were
15 supposed to have acted on?

16
17 DC: No, sir.

18
19 Presiding Officer: You don't?

20
21 DC: No, sir.

1 Presiding Officer: Why not?

2
3 DC: Because we've been here for four years and -- well,
4 Mr. al Buhlul has been here for four years. He has
5 been on the record now for two years and Your Honor
6 said there is no speedy trial. I don't know what
7 the prejudice would be in waiving -- I think that
8 the record is fairly clear that I'm doing the best
9 that I possibly can to sort through what I can and
10 can't do for Mr. al Buhlul, and that the issue is
11 not as simple as you say do it and I have to do it,
12 respectfully, sir.

13
14 And I'm doing the best that I can. I would
15 agree -- the only thing that I think I've done
16 wrong in this case is failing to ask for an
17 extension to file the law motions and I didn't ask
18 for the extension. I -- I would -- I realize now I
19 didn't ask for the extension and I appreciate
20 Mr. -- or excuse me, Colonel [REDACTED] comment.
21 They were due like on the 20th or 21st, sir, of
22 this month?

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Presiding Officer: [Indicating]

DC: And we were down here on the 27th or 28th and I
 knew by the time we were down here I would address
 the issue any way. I should have asked for an
 extension. That's no excuse. I was too
 lackadaisical in that approach. I ask for that
 extension now. But I'm doing the best that I can.
 It's two tables worth of people, plus two tables
 worth of people two years ago that were sitting
 here, I assume. I was in Wyoming and there is me
 sitting here in my chair. I'm doing the best that
 I possibly can and it's not as easy, sir, as simply
 Fleener take that caption off of Hick's motions and
 file them in al Bahlul's let's go to court.

 One, I would never do that; but two, I don't
 believe that Mr. al Bahlul would want me to do
 that.

 So I have talked to people. I am getting as much

1 guidance as I possibility can, I ask for your
2 patience and I know that you recognize that this is
3 a -- this is an interesting issue. It's rather
4 unprecedented, so -- because if we were in a court,
5 Mr. al Bahlul would be representing himself. I
6 would be sitting as standby counsel and he would
7 either -- well, I think he showed he would do a
8 decent job, yesterday. I accept that. I'm doing
9 everything I can to vindicate his right to of
10 self-representation and get him a lawyer of his
11 choosing and do what I need to do, to do that. I
12 certainly consider that within the goal of my
13 representation and the scope of my Mr. al Bahlul's
14 agency or my agency for Mr. al Bahlul.

15
16 But I'm doing the best that I can.

17
18 Presiding Officer: Major Fleener, --

19
20 DC: Yes, sir.

21
22 Presiding Officer: -- it's not that I don't appreciate the

1 difficult position that you find yourself in and
2 I'm not talking about the representation of all
3 matters. As I stated on the record, I once again
4 note that Major Fleener has only been detailed to
5 this case since the third of November and he has no
6 assistant counsel detailed to the case.

7
8 I don't expect miracles from anyone; however, I do
9 require that you comply with my instructions?

10
11 DC: Yes, sir.

12
13 Presiding Officer: And if you are not going to comply, then
14 you're going to have to ask for an extension.

15
16 I imagine that if you polled the defense counsel in
17 all four cases that I have held sessions in, and if
18 the defense counsel in the hundreds and thousands
19 of cases that I tried, you would find that my
20 failing to grant an extension is very unusual if a
21 defense counsel needs one.

1 DC: Yes, sir.

2

3 Presiding Officer: But I can't grant an extension unless
4 someone asks for it.

5

6 Has -- do I understand your comments to be that
7 Mr. al Bahlul has given you instructions to do
8 nothing in this case and to make no filings?

9

10 DC: I don't want that instruction so I'm doing the best
11 that I can because that doesn't -- I believe that
12 would help Mr. al Bahlul. I'm doing my best to get
13 that instruction and if that instruction is given
14 to me, respectfully, I don't want an answer if it
15 was because I prefer to continue to fight the
16 instruction and maybe change his mind.

17

18 But there is going to come -- there is going to
19 come a time when that issue is going to come up and
20 I believe that I am trying to treat this situation
21 with -- I'm trying to do my best to treat al Bahlul
22 with respect so that I can eventually garner an

1 effective attorney/client relationship and I
2 believe that it may happen.

3
4 So I -- the decisions that I make, I was wrong
5 about not asking for an extension and I apologize
6 to the court and I apologize to the counsel. That
7 won't happen again. That was -- I was too
8 lackadaisical and that was error.

9
10 But everything I'm doing in this case or not doing
11 in this case is to garner an attorney/client
12 relationship with Mr. al Bahlul and hopefully
13 protect his rights the best that I can, because
14 what is happening right now is -- I -- it's bad for
15 Mr. al Bahlul, the United States doesn't want this,
16 sir, Your Honor, you don't want this either I
17 assume. I'm asking for leeway and the Iowa court
18 says that not only am I an officer of the court I
19 have loyalty to the court, well, the loyalty should
20 go both ways.

21
22 As an Officer of the court, I think you should

1 recognize that I'm doing what I can do and you
2 should also recognize, sir, that we need him in the
3 chair and we need -- and he needs a lawyer. Please
4 give me time. I'm sorry for not filing for my
5 request. I'm going to file for request when I get
6 my -- upstairs. I don't want it to come where I
7 have to boycott along with Mr. al Bahlul.

8
9 Presiding Officer: Okay. Major Fleener, the President and
10 the Secretary have directed that Mr. al Bahlul be
11 provided zealous representation and part of that is
12 effective representation. It's not my duty to
13 supervise the defense counsel. It's not my duty to
14 interfere with your attorney/client relationship.
15 It is certainly not my duty to learn privileged
16 materials.

17
18 My duty is to ensure that Mr. al Bahlul gets the
19 representation commanded by the President and the
20 Secretary. After this discussion, both you and
21 Colonel Sullivan, the Chief Defense Counsel,
22 realize where I feel that you have not acted as I

1 think you should have.

2
3 DC: Yes, sir.

4
5 Presiding Officer: Amazingly enough all though we have been
6 on the island twice I have still never met Colonel
7 Sullivan but I have read his resume. I feel
8 certain that now he knows what I feel, that he'll
9 take those steps he believes are necessary.

10
11 I urged him to appoint another defense counsel. I
12 re-urge him to appoint another defense counsel to
13 assist you in preparing for and conducting Mr. al
14 Bahlul's defense so that the representation that
15 Mr. al Bahlul receives meets the standards required
16 by the PMO, the MCO, and MCI 4.

17
18 You asked that I hold off ruling on the motion to
19 quash. The trial is sitting there ready to jump up
20 and complain. I am going to take a recess for an
21 hour. You can say anything -- you can come back
22 and talk about the motion to quash and you can come

1 back and make a motion to -- for me to extend the
2 time to file law motions which would necessarily
3 include a motion for me to extend the time to file
4 evidentiary motions.

5
6 The government can say what they want to say and
7 then I'll make a ruling on both matters. Okay?

8
9 DC: Yes, sir.

10
11 Presiding Officer: Trial?

12
13 PROS: Yes, sir.

14
15 Presiding Officer: Okay. So there is no worry about this,
16 counsel will make sure that they comport their
17 in-court comments to those are such that they
18 believe the Presiding Officer wants to hear.
19 Comments about the other counsels' failures will
20 not be made in a personal manner. The Presiding
21 Officer is quite capable of making personal
22 comments if he so desires.

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We'll be in recess until 1100.

The Commission recessed at 0959.

*The Commissions hearing was recalled to order at 1109, on 2
March 2006.*

Presiding Officer: The court will come to order.

PROS: Yes. All parties who were present when we recessed
are again present. All -- yeah.

Presiding Officer: With the exception of Mr. al Bahlul, who
is still --

PROS: Yes, with the exception of Mr. al Bahlul.

Presiding Officer: -- who is still --

PROS: I would request that you inquire again as to
whether or not --

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Presiding Officer: Okay.

PROS: -- counsel had a chance --

Presiding Officer: Have you talked to Mr. al Bahlul?

PROS: -- to talk to him, if he still wishes to voluntarily
absent himself.

DC: I personally did not speak with him during this
recess. My interpreter did and -- because I was
preparing motions, and I instructed the interpreter
that -- to find out if Mr. al Bahlul wanted to
come. He still does not want to come.

Presiding Officer: Okay. I find that sufficient. Is that
sufficient for you?

PROS: Yes, sir.

Presiding Officer: Sometimes I say things and I don't phrase

1 them correctly. When I realize that, I try to
2 correct them.

3
4 When I was addressing Lieutenant Colonel [REDACTED] at
5 the last session, I said he -- he should only make
6 those comments -- or argument that I want to hear.
7 That is not accurate. You, and all counsel,
8 Colonel [REDACTED] should make those comments and/or
9 arguments that I need to hear.

10
11 PROS: Yes, sir.

12
13 Presiding Officer: I apologize for the misstatement.

14
15 The reason I delayed starting this was I received
16 D103(c) -- (b), rather, which was the defense reply
17 to the prosecution response to the motion to quash.

18
19 You received a copy at approximately the same time
20 I did; correct, trial?

21
22 PROS: Yes, Your Honor.

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Presiding Officer: I took the time while we were sitting
here to read it. Have you had an opportunity to
read it?

PROS: Yes, sir. It looks familiar.

Presiding Officer: Have you had an opportunity to read it?

PROS: Yes, sir. I'm saying the argument is familiar to
me.

Presiding Officer: Okay. Do you want to say anything, Major
Fleener, to supplement your reply?

DC: Yeah. A couple of things, sir.

First, the government's argument, or lack thereof,
should speak volumes because there is no position
they can take which they can say with a straight
face is a reasonable position why this thing should
continue to go with just Your Honor -- excuse me,

1 with just you sitting here, sir.

2
3 And let me begin by saying, this is jurisdictional.
4 They try to swap the burden and move it on me and
5 say it's not jurisdictional, but it's -- this is a
6 jurisdictional defect, and we cited that old
7 Supreme court case that was in the last two pages
8 of this brief. It's speaking of courts-martial.
9 One of those inferior courts of limited
10 jurisdictions to give effect to it's sentences must
11 appear affirmatively and unequivocally that the
12 court was legally constituted, that it had
13 jurisdiction, that all of the statutory regulation
14 governing its proceedings had been complied with.

15
16 The only -- applying that would start with the
17 President's Military Order. And so this is a
18 jurisdictional defect. It's not as the government
19 would like it to be; that it's burden. It is their
20 burden to show by preponderance of the evidence
21 that their interpretations consist with the
22 President's Military Order.

1
2 Their argument on Presidential silence is just not
3 persuasive. August 29th, the -- hurricane,
4 Hurricane Katrina hit two days later. President
5 Bush was a little busy. And I don't imagine he sat
6 down and pondered MCO Number 1 and its effects and
7 compared it to his PMO in deciding and was trying
8 to think of whether this is the way he wanted to go
9 or the way he didn't want to go. Presidential
10 silence should have no effect on your decision in
11 this particular case because it has no effect. It
12 should mean nothing.

13
14 Again, these are common law courts. There is -- if
15 it's a common law tribunal -- and no tribunal in
16 the history of the common law has ever been set up
17 this way. If the order came from the 1942
18 Presidential Order which set up military tribunals
19 and is essentially identical and in 1942, the
20 tribunals that were set up consistent with the
21 President's Military Order had all the members
22 sitting consistent with every Commission that has

1 occurred in modern times with all the members
2 sitting, all the members should be here.

3
4 It is -- it's the correct interpretation, and it is
5 the only reasonable interpretation. Triers of law
6 and fact when in a Military Commission setting,
7 when the entire history of these things has been
8 triers of law and fact -- Presiding Officers, other
9 members, but they all try law and fact -- that's
10 what triers of law and fact is. It's not -- this
11 isn't a goofy application of statutory
12 construction. You just read the document, triers
13 of law and fact.

14
15 So, respectfully, sir, you can't sit by yourself.
16 The issue of Mr. al Bahlul representing himself and
17 my ability to withdraw should be decided by the
18 entire Commission. And Your Honor needs to -- I --
19 I would respectfully request Your Honor abate these
20 proceedings until the entire Commission can decide
21 that question, sir.

1 Presiding Officer: Trial?

2

3 PROS: Thank you, Your Honor. Your Honor, with regards to
4 the argument on Presidential silence, what I'd like
5 to do is supplemental argument with the fact that
6 the President has not been silent on this issue,
7 and I apologize for not bringing it to your
8 attention sooner.

9

10 Under the Detainee Treatment Act of 2005, which was
11 enacted by Congress recently and signed by the
12 President, Section 3 Review of Final Decisions of
13 the Military Commissions, A, in general, subject to
14 Paragraphs B, C, and D of the United States Court
15 of Appeals for the District of Columbia Circuit,
16 shall have exclusive jurisdiction to determine the
17 validity of any final decision rendered pursuant to
18 Military Commission Order Number 1, dated August
19 31st 2005, and then in parenthesis, or any
20 successor in military order.

21

22 Clearly, the President is aware that there is an

1 amended Military Order; and clearly he wishes,
2 through Congress and through the Detainee Treatment
3 Act, that it be applied in these proceedings.

4
5 Presiding Officer: Major Fleener?

6
7 DC: If that's it, I'll rest.

8
9 Presiding Officer: In reference to D103, the defense motion
10 to quash, I've considered the motion, the response,
11 the reply, and the arguments by both sides on the
12 record.

13
14 I am persuaded now by the prosecution's brief.
15 It's argument. And the authority stated -- or
16 cited therein that the Secretary of Defense did not
17 exceed his authority under the President's Military
18 Order when he issued Military Commission Order
19 Number 1, on 31 August 2005.

20
21 I am further persuaded that the procedures which
22 the Secretary established in the MCO are not in

1 conflict with the President's Military Order.

2
3 The motion to quash is denied. I'll attach
4 essential findings of fact and conclusions of law
5 to the record prior to authentication.

6
7 Okay. Several times during the past -- last
8 session, the defense made apologies about not
9 filing extensions. The issue that we're looking at
10 is not really about filing extensions. That's just
11 a small part of the issue. The issue is about
12 whether failing to file motions or request
13 extensions should or does constitute waiver of
14 legal issues not raised in a motion.

15
16 My concerns aren't whether or not I've got a piece
17 of paper. We're not talking about a paper chase
18 here. It's whether or not -- it's that not having
19 a motion, does that mean that the defense doesn't
20 contest the legal issue and is satisfied with the
21 state of the law?

1 Yesterday, Major Fleener was talking about me
2 shaping the procedures. And I state, fully,
3 openly, and on the record that in connection with
4 motions, since July of 2004, I have issued four
5 different versions of POM 4 which tells people how
6 to file motions and when they've got to be filed
7 and what they have to do. They're available on the
8 web. They're given to every counsel, and the issue
9 is not paper. The issue is how do I know what the
10 parties want.

11
12 Okay. You also made it clear to me, Major Fleener,
13 that you feel it your duty to pursue -- you don't
14 have to stand -- well, you can stand up if you
15 want -- to pursue Mr. al Bahlul's right, as you
16 characterize it, to pro se representation. To
17 date, I have not received a motion from you that
18 requests that I recognize such a right.

19
20 You've stated things on the record, but I don't
21 have a motion that tells me what you think what is
22 different. You know, if you look at the Presiding

1 Officer 102 series of filings, you're aware that
2 I've seen a lot on the issue; but I have not had
3 the benefit of your viewpoint or your thoughts or
4 your legal authorities.

5
6 I presume that one reason that one asks questions
7 on the voir dire is to get the truth. And one
8 question you asked was that if I have found that a
9 provision of what I call Commission law -- that's
10 found in Presiding Officer Memorandum 1 -- was in
11 conflict with some greater law, what Colonel [REDACTED]
12 termed "the hierarchy of laws," if I would feel
13 free to overrule it. I told you, "Bring it to me,
14 and I will if I feel so." But I haven't had a
15 motion from you.

16
17 Amicus briefs were filed by Lieutenant Commander
18 [REDACTED] and Major [REDACTED] who were detailed to
19 represent Mr. al Bahlul some time in February of
20 2004, and were on the case at least until the end
21 of 2004. But I had them file amicus briefs because
22 I had not yet reached the issue, and there had been

1 no decision made.

2
3 In this case, you have described interactions with
4 your client that may indicate that some of his
5 desires may have changed. If the defense believes
6 that, notwithstanding the requirements of
7 Commission law concerning pro se representation,
8 the defense should file such a motion not later
9 than 24 March 2006. If a motion is filed, the
10 normal POM 4-3 requirements for response from a
11 client apply.

12
13 If such a motion is not filed by that time or an
14 extension granted, the issue will be waived for the
15 purposes of this Commission. Any collateral relief
16 that you want to pursue, Major Fleener, is up to
17 you. You know that. You can sue whomever you want
18 to, wherever you want to; but in so far as this
19 Commission is concerned, we will proceed on.

20
21 I'm also concerned, Major Fleener, because you
22 stated that you're trying to avoid having Mr. al

1 Bahlul make certain decisions because you don't
2 want him to make a decision that you believe would
3 impair your ability to represent him. I under -- I
4 understand that. However, that sought for decision
5 from Mr. al Bahlul cannot and will not be allowed
6 to unduly -- please note the unduly, trial, when
7 you stand up to comment -- unduly delay the
8 performance of your duties until you get a decision
9 or forever until Mr. al Bahlul -- because Mr. al
10 Bahlul says nothing. That's just unacceptable.
11 We've got to move forward.

12
13 Not only will I not, but I don't believe I can,
14 tell you how you must communicate with your client
15 and what sort of decisions have to be made and how
16 a decision is made. At some point, you will either
17 file motions or you won't. If you file motions,
18 they'll be litigated. If you don't file the
19 motions, they'll be waived.

20
21 I received right before court RE-169, which was a
22 request for extension to file motions.

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You got a copy of that; right, trial?

PROS: Yes, I did, sir.

Presiding Officer: You don't in this request tell me when
you want the extension until, Major Fleener.

When do you want to extension until?

DC: I'd like as much time as you'd give me.

Sir, and I don't mean to make it sound like it's --
like it's funny. I need to try and establish an
attorney/client relationship with him. Everybody
will be better served. My goal is to have him
better served. I'm sure your goal is to have a
full and fair trial. I would hope that's their
goal as well. And I believe all three of us would
agree -- the prosecution counted as one, though
they are several tables full -- that that would be
best served -- that would best serve everyone.

1
2 So the -- the problem is that they kept lawyers
3 from coming down here for several -- for several
4 years, so you couldn't -- and now we're jamming the
5 American lawyer military guy down his throat. It
6 takes time. I have tried to balance his need for
7 autonomy with my need to get on his case and trying
8 to understand it and trying to balance his, you
9 know, not wanting me on the thing, with me needing
10 to be there because you're telling me to be there.
11 This -- it's hard.

12
13 So when I say I need more time, I need more time.
14 I'm going to -- I can't -- I'm going to spend time
15 down here in Guantanamo Bay in the next month or
16 so, and hopefully be able to meet with Mr. al
17 Bahlul several times if you will allow me to. I'm
18 going to attempt to go to Yemen and find him a
19 lawyer. I'm going to attempt to seek relief of the
20 denial of self-representation. I -- I was
21 concerned that -- I thought your decision was
22 final, sir. I didn't realize that there is a time

1 to file an additional motion.

2
3 I mean, I understand how this system appears, at
4 least to the litigant, which is it was -- his old
5 lawyers asked the Appointing Authority to change
6 the rules and allow for self-representation. They
7 said no, which would really be a person I suppose I
8 would appeal your decision to; but it appears to be
9 the guy who's already decided the issue. And when
10 you denied him his right of self-representation
11 here a month ago, I thought that that was
12 essentially the final decision by this tribunal
13 with the exception of my argument that the entire
14 Commission should be deciding this.

15
16 And now you said that you want me to brief it on
17 the 24th of March. I will be happy to brief it by
18 then, sir. But as far as time goes, I need several
19 months and the Supreme -- there -- respectfully,
20 sir, there shouldn't be a rush. On this particular
21 case, sir, there should not be a rush for many
22 reasons.

1
2 One, the Supreme Court -- the rest of the cases --
3 of the three -- four original cases, three of them
4 are in stays. I don't know why this one is not.
5 But three of them are in stays and -- because
6 they're waiting to see what the Supreme Court says
7 about the legitimacy of the entire process.

8
9 I would like -- I -- and another issue that is
10 important when you're deciding how much time to
11 give me, sir, is you have made comments about --
12 both involving the Chief Defense Counsel and myself
13 about, you know, getting more lawyers involved in
14 this case. Please understand how that would work.
15 If I have any obligations right now to Mr. al
16 Bahlul -- and I certainly believe I do -- it's that
17 he doesn't want any American lawyers on his case.

18
19 So if mister -- excuse me -- if Colonel Sullivan --
20 he has no lawyers in the office to give me, none.
21 If he did, I don't believe I would be the first
22 priority because he has another case that he still

1 hasn't given out a lawyer to because he does
2 haven't enough lawyers.

3
4 If there were enough lawyers, then the question is,
5 do I allow -- when I know what Mr. al Bahlul's
6 wishes are, that he doesn't want American lawyers
7 on his case, do I allow another one to jump on too?
8 I don't know.

9
10 All I do know is that if I am on the case, you can
11 make me be here and you've done a good job. These
12 decisions that are being made that I'm trying to
13 make are delicate, and I respectfully request
14 until -- I request 90 days from today for law
15 motions -- what everyone else considers law
16 motions, I'm sorry. I saw grimaces from all of the
17 parties. I don't know if that was about the time
18 or how I was referring to them.

19
20 Presiding Officer: I was -- the grimace from me was I was
21 trying to count on my fingers what 90 days was.

1 DC: It's three months, sir.

2

3 Presiding Officer: Thank you.

4

5 DC: Yes, sir. I didn't -- I wasn't -- I didn't mean to
6 be mean. The -- I would ask for 90 days. I would
7 hope I wouldn't need that much time -- I may need
8 more. If have a -- but the bottom line is if we
9 have to delay this hearing for an extra month or
10 two in order for him to get representation so that
11 it doesn't look like an appellate argument with me
12 standing here with a bunch of paper and
13 witnesses -- except witnesses being paraded in
14 front of everybody. If you delay 60 days or 90
15 days to make that not happen, that's, respectfully,
16 the easy decision, is you wait 60, 90 days so that
17 doesn't happen.

18

19 I'm doing the best I can to get the relationship
20 going. I apologize for not asking for a delay in
21 my filings -- that was my fault -- and I would like
22 as much time as you would possibly give me in order

1 to provide Mr. al Bahlul a defense.

2
3 Presiding Officer: Trial?

4
5 PROS: Clearly, Your Honor, that is an outrageous amount
6 of time. We don't object to a reasonable delay.
7 We would suggest anything over 30 days is
8 ridiculous.

9
10 I keep hearing about how he is trying to develop
11 this touchy-feely relationship with his client.
12 His client has already been in here and told us
13 that he doesn't accept the jurisdiction of this
14 court, that he doesn't apply -- want to apply our
15 rules or our proceedings. Those are all legal
16 matters that Major Fleener can address in his
17 motions just like all of the other defense counsels
18 in all of the other Commissions cases have already
19 addressed, or are addressing as we speak, that
20 don't require this great relationship.

21
22 I was a defense counsel for seven-and-a-half years.

1 I can't remember a time when a client has come to
2 me and said, "Hey, here's how you argue the
3 jurisdiction motion." That's just not how it
4 works. It's a legal matter for a lawyer to handle.
5 He is a lawyer. He's been representing him. He's
6 already had 45 days since the last time he was
7 ordered to file motions. Anything more than 30
8 days, we think, is simply not acceptable.

9
10 Plus, one of the concerns I have in listening to
11 Major Fleener is he keeps talking about how I'm
12 going to take time go to find a Yemeni attorney.
13 As, Your Honor, knows under the rules if he goes
14 and finds a Yemeni attorney who is willing to do
15 this, if he doesn't otherwise qualify under the
16 rules, it's a wasted effort. And my concern is
17 that we're going to -- if you give him 90 days is
18 nothing will be done on the motions. We'll come
19 back in 90 days. Major Fleener will say, "I found
20 a Yemeni attorney. I want him to represent me,"
21 and we'll go through the thing again where it comes
22 out that legally this Yemeni attorney can't

1 represent him under the rules, and we'll have
2 wasted another 90 days.

3
4 My concern at the last 8-5 session is, we need to
5 move this along; and a 90-day extension, when no
6 other lawyer certainly needs that for is we say
7 it's excessive.

8
9 Also, this is not a unique issue that you have a
10 client that doesn't want to talk to you. It comes
11 up in criminal cases often. Now, certainly,
12 everything about the Commissions is unique;
13 however, the relationship between an attorney and a
14 client and having a client that doesn't want you,
15 is not unique.

16
17 DC: Please?

18
19 Presiding Officer: You may speak only if you are responsive
20 and short. Go. Not your height, your argument.
21 Go on.
22

1 DC: I wish it were as simple as Colonel [REDACTED] made it
2 sound.

3
4 You have to have a client want you in order to make
5 filings, you do. And the person who didn't want --
6 in all his cases that he's had this great
7 experience in, if they don't want their lawyers,
8 they represent themselves. So it is an interesting
9 novel issue. This is not -- he makes it sound like
10 this happens every single day. There is nothing
11 more fundamental than a guy's right to a lawyer.

12
13 Now -- and I say that and I -- that I believe that;
14 that's why I came on this case, left my quiet job
15 in Wyoming and came here because there is nothing
16 more fundamental than this. If it takes --

17
18 Presiding Officer: Okay. That is not short and responsive --

19
20 DC: Sir --

21
22 Presiding Officer: I really -- I really don't need to hear

1 anymore on that. I'm going to talk now. Thank
2 you.

3
4 Okay. I am going to go back to my chambers -- a
5 rather fancy term for the office I occupy -- and
6 I'm going to consider this. I am going to consider
7 that, among other things, Mr. al Bahlul to the best
8 of my knowledge and belief, despite the directions
9 of the PMO and the MCO, was without an attorney for
10 a significant period of time until Major Fleener
11 was detailed.

12
13 Commander [REDACTED] retired in January of 2005. Major
14 [REDACTED] became Colonel [REDACTED] and went off to do
15 other things, and I don't believe that they have
16 been representing him. So I am going to consider
17 that -- I am going to consider that factor.

18
19 I am also going to consider the -- what's happened
20 on this case since Major Fleener came on, and I
21 will issue a ruling, and you-all will get it as
22 to -- there will be an extension of time. Even the

1 Trial Counsel agrees there should be some
2 extension; although, I may be giving a little bit
3 too much there. I will tell you what it is going
4 to be, and I will lay it out on the record.

5
6 Okay. Before we stop, just so there is no future
7 problems on this, Major Fleener, you asserted that
8 your request for an opinion to the Wyoming Bar was
9 attorney work product.

10
11 How is that? I don't understand.

12
13 DC: It was compiled in my representation of Mr. al
14 Bahlul or not representation of Mr. al Bahlul.

15
16 Presiding Officer: Your request to the Wyoming Bar for an
17 opinion concerning your activities, you state, is
18 an attorney work product on --

19
20 DC: I do.

21
22 Presiding Officer: -- that basis?

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DC: Yes, sir.

Presiding Officer: Okay. Let me tell you, Major Fleener, if you indeed submitted a request to the Wyoming Bar, an ethics opinion, and the opinion is in the same mode as the one you submitted to Iowa, the Commission will not consider any response to be based upon a complete record.

So we'll wait and see what happens there.

DC: Sir, I can tell you what's going to happen. There is going to be no opinion. They will just decline to give an opinion, which is their prerogative. I just wanted to make sure they were declining to give an opinion. They declined orally, and I submitted a request in writing and they declined. And that's the end of it. So I'm not going to be seeking any more advice from the Wyoming Bar.

Presiding Officer: Did you just say they declined in

1 writing?

2
3 DC: No. I submitted my request in writing.
4

5 Presiding Officer: If you get a response saying they decline
6 to render an opinion, I certainly believe that that
7 is of import to the issues before this court.
8

9 DC: Yes, sir.
10

11 Presiding Officer: And you will furnish it.
12

13 DC: Yes, I will.
14

15 Presiding Officer: Last thing, I just got a note that the
16 detainee has requested an audience with the
17 Presiding Officer. I don't know what Mr. al Bahlul
18 wants. I will take a 10-minute recess, Major
19 Fleener, for you to discuss with Mr. al Bahlul
20 whatever it is. So there is no question, I believe
21 that there's been no -- no one has been bent over
22 backwards more for -- to let someone say things on

1 the record. We've gone past that, I believe.

2
3 So you may talk to him. I'll be in my chambers.

4 If you want to have another session, come knock on
5 my door. Okay?

6
7 DC: Yes, sir.

8
9 Presiding Officer: Trial, you got anything for --

10
11 PROS: No, sir. So I understand, are we coming back on
12 the record later or are you just going to issue
13 your opinion and put it in the record?

14
15 Presiding Officer: I issue rulings, not opinions.

16
17 PROS: I'm sorry, sir.

18
19 Presiding Officer: I'm going to wait in my chambers. If
20 Major Fleener knocks on my door and says he wants a
21 session with Mr. al Bahlul, we will come back into
22 court.

1
2 If he knocks on my door and says, we won't -- I
3 don't want a session with Mr. al Bahlul, I have no
4 further business that I need to take care of. If
5 you have some, bring it up now.
6

7 PROS: Yes, sir. I do have one.
8

9 We would ask that you modify your discovery order
10 in the following respect:
11

12 You put in discovery in Paragraph 14 that we must
13 serve discovery on the detailed defense counsel
14 unless somebody else is delegated. On the 24th of
15 January, our paralegal was informed by the
16 paralegal assigned to the al Bahlul case that she
17 had been instructed not to accept service. We
18 spent the better part of three, four weeks trying
19 to track down Major Fleener to have him accept the
20 service.
21

22 All that is doing is delaying. We're simply --

1 we're not doing anything other than handing him our
2 required discovery. We would ask that the order be
3 modified that we can serve the paralegal or
4 somebody in authority in that office other than
5 Major Fleener so we can -- to help expedite the
6 process.

7
8 Presiding Officer: Much to the dismay of the Assistant in
9 this case, I will permit you to make a special
10 request by e-mail. You make that request to ALL
11 CON[CERNED], Major Fleener will reply by e-mail,
12 and I will make a decision.

13
14 How is that?

15
16 PROS: Thank you, Your Honor.

17
18 Presiding Officer: Anything else?

19
20 PROS: That's it for now, sir.

21
22 Presiding Officer: I'll expect to hear something from you,

1 Major Fleener, by five minutes of 12.

2
3 DC: One way or the other, sir?

4
5 Presiding Officer: Well, I don't want to wait there all day
6 in my robe.

7
8 DC: Yes, sir.

9
10 Presiding Officer: The court's in recess.

11
12 *The Commissions hearing recessed at 1142, on 2 March 2006.*

13
14 *The Commissions hearing was recalled to order at 1215, on 2*
15 *March 2006.*

16
17 Presiding Officer: The Commission will come to order.

18
19 PROS: All parties who were present at the recess are
20 again present. The Accused --

21
22 Presiding Officer: And we'll be hearing from Major Fleener

1 right now.

2

3 PROS: Okay.

4

5 Presiding Officer: Major Fleener, did you have an

6 opportunity to see your client in that recess?

7

8 DC: I did.

9

10 Presiding Officer: Is his absence voluntary?

11

12 DC: It is.

13

14 Presiding Officer: Okay. Go on.

15

16 DC: He'd like to meet you in private.

17

18 Presiding Officer: Okay. You are requesting that I meet

19 with Mr. al Bahlul; is that correct -- on his -- on

20 his behalf?

21

22 DC: I was going to say, he's requesting to meet with

1 you in private. I'm a conduit.

2
3 Presiding Officer: Relaying that request.

4
5 DC: That's the third time I'm used "conduit" in the
6 last two days.

7
8 Presiding Officer: Okay. I decline the opportunity to meet
9 with him in private. If you have materials that
10 you wish to present on his behalf, you know how to
11 do it.

12
13 DC: Yes, sir.

14
15 Presiding Officer: Anything further before we recess?

16
17 PROS: Not from the government.

18
19 DC: No, sir.

20
21 Presiding Officer: The court's in recess to meet on future
22 call.

1

2 *The Commissions hearing recessed at 1216, on 2 March 2006.*


3

**AUTHENTICATION OF
FINAL SESSION TRANSCRIPT**

in the case of:

United States v. Ali Hamza Sulayman al Bahlul
a/k/a/ Ali Hamza Ahmed Suleiman al Bahlul
a/k/a Abu Anas al Makki
a/k/a Abu Anas al Yemeni
a/k/a Mohammad Anas Abdullah Khalidi

This is to certify that the Pages 139 through 407 are
an accurate and verbatim transcript of the proceedings
held in the above styled case on March 1 and 2, 2006.



Peter E. Brownback III
Colonel, USA

20 March 2006
DATE